Petition

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81-1627

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SHEPARD, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, ET AL., *Intervenors.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court below erred in upholding the National Labor Relations Board's requirement that actual coercion must have been used to enforce a voluntary "hot cargo" agreement before a "make whole" remedy was appropriate for a violation of Section 8(e) of the Labor Management Relations Act.

2. Whether the Court below erred in enforcing the National Labor Relations Board's Order denying the petitioner a "make whole" remedy and allowing respondent labor union to retain petitioner's initiation fees, dues and fringe benefit contributions obtained through the enforcement of a "hot cargo" agreement prohibited by Section 8(e) of the Labor Management Relations Act.

PARTIES TO THE PROCEEDINGS BELOW

To date, the parties to these proceedings have been:

Larry Shepard

The National Labor Relations Board

Building Material and Dump Truck Drivers, Teamsters Local 36

California Dump Truck Owners Association

Associated General Contractors of America, San Diego Chapter, Inc.

San Diego Building Contractors Association

Engineering and General Contractors Association

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Larry Shepard prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case.

REPORT OF THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at —— F.2d ——, 108 LAB. REL. REP. (BNA) 3153 (D.C.

Cir. 1981), and is reproduced as Appendix A of this petition. The decision and order of the National Labor Relations Board is reported at 249 N.L.R.B. 386 (1980), and is reproduced as Appendix B of this petition. The conflicting opinion of the United States Court of Appeals for the Ninth Circuit, in an identical (companion) case, is reported at —— F.2d ——, 109 LAB. REL. REP. (BNA) 2181 (9th Cir. 1981), and is reproduced as Appendix C of this petition.

JURISDICTION

The court of appeals issued its opinion denying the petition for review and enforcing the order of the National Labor Relations Board on December 4, 1981. Judgment was entered that same day. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

The statute involved is the Labor Management Relations Act ("Act"), as amended, 28 U.S.C. § 141 *et seq.* (1976). The relevant sections of the Act are 8(b)(4)(ii)(A)(B), 8(e), and 10(a) and (c), codified at 29 U.S.C. §§ 158(b)(4)(ii)(A)(B), 158(e), and 160(a) and (c) (1976). They provide in pertinent part:

> § 8 *Unfair labor practices*
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

(A) forcing or requiring any self-employed person to join any labor . . . organization . . ..

(B) forcing or requiring any person . . . to cease doing business with any other person . . ..

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or . . . agrees to . . . cease doing business with any other person, and any contract or agreement entered into . . . shall be to such extent unenforceable and void: . . ..

* * * *

§ 10 *Prevention of unfair labor practices*

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . ..

* * * *

(c) . . . If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue . . . an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action . . . as will effectuate the policies of the* [*Act*] . . .. (Emphasis supplied).

STATEMENT OF THE CASE

The petitioner is a small, independent businessman.

Following his retirement from the United States Navy, he made a down payment on a truck-tractor, leased a dump-trailer, and went into business hauling sand, gravel and other building materials to various construction sites in San Diego County, California.

The petitioner obtained his hauling jobs through various truck brokers serving as middlemen between the dump truck owner-operators and the contractors requiring dump truck services. Primarily, the petitioner used the brokerage services of Terra Trucking which also leased him his dump-trailer.

The petitioner was neither a member of the Teamsters Union nor a member of an unincorporated association of independent dump truck owner-operators—the California Dump Truck Owners Association ("CDTOA"). For over a decade the CDTOA and various Teamster unions throughout California[1] waged a legal battle over whether the dump truck owner-operators were "employees," as defined by the Act, or independent contractors.

In 1978, following significant litigation (and a 1977 reversal on the issue by the Ninth Circuit),[2] the Na-

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[1] The Teamsters unions involved in the construction industry have divided the State of California into three areas—Northern California, Southern California, and San Diego County—governed by separate Master Labor Agreements negotiated with contractor associations.

[2] *Joint Council of Teamsters No. 42* v. *NLRB*, 450 F.2d 1322 (D.C. Cir. 1971); *Associated General Contractors (A. R. Kramer)*, 201 N.L.R.B. 311 (1973), *vacated*, 239 N.L.R.B. 686 (1978); *Associated General Contractors*, 209 N.L.R.B. 363 (1974); *Associated General Contractors*, 220 N.L.R.B. 540 (1975), *rev'd*, 564 F.2d 271 (9th Cir. 1977), NLRB Supplemental Decision, 239 N.L.R.B. 686 (1978).

tional Labor Relations Board ("Board") finally held that the dump truck owner-operators were independent contractors and *not* employees.

For many years the California Teamster unions had negotiated a series of Master Labor Agreements ("MLA") with general contractor associations throughout the State. Starting in about 1972, the MLA's contained "hot cargo" provisions requiring the contractors to cease doing business with persons not covered by the MLA's or similar agreements. In addition to the "hot cargo" provisions, the MLA's contained traditional union-security language requiring "employees" to become members of the Teamsters Union and pay initiation fees and dues as a condition of continued employment. In 1974, the petitioner's truck broker—while working as a truck operator—executed a Short Form Agreement with the Teamsters Union, agreeing to be bound by the terms of the San Diego County MLA. The broker never cancelled the agreement.

Notwithstanding the on-going litigation over the status of the owner-operators, the 1977-80 MLA's for San Diego County and Southern California provided that the owner-operators were "employees!"

In September of 1978, Teamsters Local 36 sent petitioner's truck broker a letter stating that certain owner-operators, including the petitioner, were not "members in good standing," as required by the MLA. The letter demanded that these owner-operators be denied work until cleared by the Union. The truck broker held a meeting with the owner-operators and informed them that if they did not join the Union he would stop brokering their services and "pull the pin"

on their rental trailers. The petitioner, in order to stay in business, joined the Union under protest. So did some of the other owner-operators. They paid initiation fees, union dues and, indirectly, benefit fund payments.

The petitioner then filed unfair labor practice charges on behalf of the owner-operators alleging violations of section 8(b)(4) of the Act—the secondary boycott prohibitions. The Board's Regional Director requested that these charges be withdrawn and replaced by charges alleging a violation of section 8(e) of the Act—the "hot cargo" prohibition. The petitioner complied. His charges were then consolidated with similar charges already on file by CDTOA. The Board issued a complaint alleging that the Union and the contractor associations were violating the "hot cargo" prohibitions of the Act. Eight months after the petitioner filed unfair labor practice charges, the Board obtained a federal Court injunction precluding further enforcement of the "hot cargo" provisions of the MLA. There was similar Board litigation over the Southern California MLA, but the petitioner was not involved.

The matter was tried before an Administrative Law Judge ("ALJ"), who found that the owner-operators were *not* employees but independent contractors and that the challenged provisions violated the "hot cargo" prohibitions of the Act. In addition to a narrow cease-and-desist order, the ALJ ordered the parties to "make whole" the owner-operators for their compulsory payment of initiation fees and dues (as well as contributions made on their behalf to the Union benefit funds).

Exceptions were taken, and the matter was submitted to the Board. In 1980, the Board upheld the ALJ but

expressly deleted his proposed "make whole" reimbursement order because: (1) there was no evidence that the Union had coerced the owner-operators into joining the Union, and (2) such orders, which "were typically used to 'make whole' *employees* for violations of the Act, [were] generally overbroad and inappropriate in the context of 8(e) violations." Additionally, the Board noted that the aggrieved owner-operators—because they were independent contractors—could pursue a damage claim under section 303 of the Act. Accordingly, the Board held that the reimbursement order would not effectuate the remedial policies of the Act. The Board entered a similar decision in its case involving the Southern California MLA.

The Teamsters petitioned for review in the District of Columbia Circuit while the petitioner and CDTOA sought review in the Ninth Circuit. The Board cross-petitioned for enforcement of its Order. The District of Columbia Circuit heard the "race-to-the-courthouse" battles involving both the San Diego MLA and the Southern California MLA cases. The District of Columbia Circuit retained the San Diego MLA case and transferred the Southern California MLA case to the Ninth Circuit.[3]

On December 4, 1981, the District of Columbia Circuit enforced the Board's Order in all respects and denied the petitioner's request for a "make whole" remedy.

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[3] A portion of that case had previously been before the Ninth Circuit in 1977, when the Court reversed the Board's prior ruling that the dump truck owner-operators were employees. *Associated General Contractors* v. *NLRB*, 564 F.2d 271 (9th Cir. 1977).

Two weeks later, the Ninth Circuit issued its ruling concerning the Southern California MLA. The Ninth Circuit enforced the Board's Order regarding the "hot cargo" violations, but remanded the case to the Board to "fashion a make whole remedy or to show cause why a make whole remedy would not effectuate the purposes of the Act."

REASONS FOR GRANTING THE WRIT

At the outset, the petitioner acknowledges that the "Board has broad discretion to adapt its remedies to the needs of particular situations." *Carpenters Local 60* v. *NLRB*, 365 U.S. 651 (1961). But the Board's discretion is not unlimited. *See Acco Construction Equipment, Inc.* v. *NLRB*, 511 F.2d 848, 852 (9th Cir. 1975).

Petitioner urges that the Board's "non-remedy" in this case exceeded its broad discretion and the Court of Appeals thus erred in enforcing the Board's Order. The denial of a "make whole" remedy:

(1) leaves the Union unjustly enriched and provides an incentive for others to violate the Act,

(2) denies the injured parties a meaningful remedy,

(3) wastes judicial resources by requiring the petitioner and other owner-operators to seek complete relief in another forum,

(4) defeats the legislative intent of the "hot cargo" amendments, and

(5) undermines the purpose of the Act.

In the underlying case, the Board declined to issue a "make whole" remedy because:

(1) There was no evidence that the union coerced the petitioner and the other owner-operators into joining the union,[4] and

(2) such orders were typically used to "make whole" *employees* and were generally overbroad and inappropriate in the context of 8(e) violations. (Board's emphasis).

249 N.L.R.B. 386 n. 2, Appendix B, pp. 16a-17a. The Board decision went on to point out that the owner-operators—as independent contractors—could pursue a damage claim under section 303 of the Act. *Id.*

A. The Board's Limited Remedy for a § 8(e) Violation Defeats the Intent of the Hot Cargo Amendment.

The Court of Appeals for the District of Columbia Circuit declined to disturb the Board's remedy. It reasoned that since the case did not involve a coercive secondary boycott (in violation of section 8(b)(4)), a "make whole" remedy would be *punitive* and beyond the powers of the Board in the context of a voluntary "hot cargo" agreement (in violation of section 8(e)). Under this rationale, the parties who drafted the illegal "hot cargo" agreement retain the fruits of their endeavor while the injured party is limited to a cease and desist order—at some time in the future.

This rationale is faulty. In effect, it makes section 8(e) a "limited" unfair labor practice without an

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[4] In its Brief to the D.C. Circuit, the Board conceded that the petitioner (and the other owner-operators using the brokerage services of Terra Trucking) had been coerced into joining the Union. Brief for the National Labor Relations Board at 40.

effective enforcement mechanism. The Board's "limited" remedy provides an incentive to violate the Act and opens the door to all of the abuses Congress sought to eliminate when it added section 8(e) in 1959. Direct or overt coercion is not, and should not, be a prerequisite for *complete* relief under section 8(e).

As previously pointed out, the opinion of the Court of Appeals below directly conflicts with the recent decision of the Ninth Circuit in *Joint Council of Teamsters No. 42* v. *NLRB*, —— F.2d ——, 109 LAB. REL. REP. (BNA) 2181 (9th Cir. 1981) (attached as Appendix C to this petition). In that case the Ninth Circuit correctly disposed of the Board's artificial requirement that direct or overt "coercion" was a necessary prerequisite to a "make whole" remedy under section 8(e). The Court stated:

> We reject the Board's reasoning that the purposes of the Act are effectuated by reimbursement for violation of 8(b)(4), but not for violations of § 8(e). To be sure, reimbursement is inappropriate in the absence of coercion. (Citations omitted.) But when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation. [The "hot cargo" provision] presented the truck owners with the grim choice of joining the union or foregoing work with the signatory employers. Although the unions may not have employed coercive tactics, violative of § 8(b)(4), the inclusion of [the "hot cargo" provisions] in the collective bargaining agreement would necessarily have had the effect of coercing reluctant truck owners to join the unions.

109 LAB. REL. REP. (BNA) at 2184-85. Appendix C, pp. 50a-51a.

Petitioner submits that the Ninth Circuit has correctly analyzed the problem and its decision is in keeping with Congress' intent when it added section 8(e) to the Act. The incorrect holding of the District of Columbia Circuit should be reversed.

B. A § 303 Lawsuit Is Not a Practical Alternative to Complete Relief From the Board.

In its decision, denying the owner-operators a "make whole" remedy, the Board indicated that they could pursue further relief by way of a section 303 lawsuit. The petitioner will show that a section 303 lawsuit may not be available to remedy voluntary "hot cargo" violations and, even if available, is not a *practical* remedy.

The fact is, that without a meaningful and complete Board remedy, an independent truck owner-operator remains vulnerable to "hot cargo" violations.

He is vulnerable for a number of reasons. First, his status as "employee" or "independent contractor" depends upon the particular facts governing his actual working relationship. Even the most experienced labor practitioners have difficulty predicting how the Board and the courts will rule on this issue. *See, e.g., A. Duie Pyle, Inc.* v. *N.L.R.B.,* 383 F.2d 772 (3d Cir. 1967), *cert. denied,* 390 U.S. 905 (1968); *Joint Council of Teamsters No. 42* v. *NLRB,* 450 F.2d 1322 (D.C. Cir. 1971); *Joint Council of Teamsters No. 42* v. *NLRB,* 564 F.2d 271 (9th Cir. 1977).

Secondly, an independent owner-operator does not possess the economic resources to finance major litigation. Nor does he have the economic staying power to risk being deprived of his livelihood, even for a short period of time. Given these circumstances, the owner-

operator has little choice but to initialy capitulate to the union pressure and then seek relief through the Board's processes. By capitulating to the unlawful pressure of the "hot cargo" agreement, the independent owner-operator can avoid the economic risk of losing his business and limit his damages to the payment of initiation fees, union dues and fringe benefit contributions.

However—because his damages are so limited—it is not cost-effective for him to prosecute a section 303 suit for damages. The attorneys' fees would easily dwarf his recovery by a factor of ten. Additionally, since attorneys' fees involving the underlying NLRB proceedings are not presently available in the Ninth Circuit,[5] the independent owner-operator would be hard pressed to obtain his own legal counsel. Thus, although a private cause of action under section 303 might be available (to remedy violations of section 8(b)(4) and possibly 8(e)), it is not a meaningful remedy unless the damages are great enough to make the litigation cost-effective. That will seldom, if ever, be the case regarding independent owner-operators.

Thus, the economics of the situation forces them to seek relief through the Board. If they are fortunate enough to prevail in the Board proceedings, they could—until this Board decision—expect that their rights would be fully vindicated and that they would be "made whole" for any damages. *Teamsters Local*

---

[5] *Maxey* v. *Butchers Local 126*, 627 F.2d 912 (9th Cir. 1980); *Mead* v. *Retail Clerks Local 839*, 523 F.2d 1371, 1379-80 (9th Cir. 1975). However, on November 30, 1981, this Court granted certiorari in *Summit Valley Industries, Inc.* v. *Carpenters Local 112*, 652 F.2d 65 (9th Cir.), *cert. granted*, —— U.S. ——, 102 S.Ct. 632 (1981).

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B. A § 303 Lawsuit Is Not a Practical Alternative to Complete Relief From the Board.

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The fact is, that without a meaningful and complete Board remedy, an independent truck owner-operator remains vulnerable to "hot cargo" violations.

He is vulnerable for a number of reasons. First, his status as "employee" or "independent contractor" depends upon the particular facts governing his actual working relationship. Even the most experienced labor practitioners have difficulty predicting how the Board and the courts will rule on this issue. *See, e.g., A. Duie Pyle, Inc.* v. *N.L.R.B.,* 383 F.2d 772 (3d Cir. 1967), *cert. denied,* 390 U.S. 905 (1968); *Joint Council of Teamsters No. 42* v. *NLRB,* 450 F.2d 1322 (D.C. Cir. 1971); *Joint Council of Teamsters No. 42* v. *NLRB,* 564 F.2d 271 (9th Cir. 1977).

Secondly, an independent owner-operator does not possess the economic resources to finance major litigation. Nor does he have the economic staying power to risk being deprived of his livelihood, even for a short period of time. Given these circumstances, the owner-

operator has little choice but to initialy capitulate to the union pressure and then seek relief through the Board's processes. By capitulating to the unlawful pressure of the "hot cargo" agreement, the independent owner-operator can avoid the economic risk of losing his business and limit his damages to the payment of initiation fees, union dues and fringe benefit contributions.

However—because his damages are so limited—it is not cost-effective for him to prosecute a section 303 suit for damages. The attorneys' fees would easily dwarf his recovery by a factor of ten. Additionally, since attorneys' fees involving the underlying NLRB proceedings are not presently available in the Ninth Circuit,[5] the independent owner-operator would be hard pressed to obtain his own legal counsel. Thus, although a private cause of action under section 303 might be available (to remedy violations of section 8(b)(4) and possibly 8(e)), it is not a meaningful remedy unless the damages are great enough to make the litigation cost-effective. That will seldom, if ever, be the case regarding independent owner-operators.

Thus, the economics of the situation forces them to seek relief through the Board. If they are fortunate enough to prevail in the Board proceedings, they could—until this Board decision—expect that their rights would be fully vindicated and that they would be "made whole" for any damages. *Teamsters Local*

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[5] *Maxey* v. *Butchers Local 126*, 627 F.2d 912 (9th Cir. 1980); *Mead* v. *Retail Clerks Local 839*, 523 F.2d 1371, 1379-80 (9th Cir. 1975). However, on November 30, 1981, this Court granted certiorari in *Summit Valley Industries, Inc.* v. *Carpenters Local 112*, 652 F.2d 65 (9th Cir.), *cert. granted*, —— U.S. ——, 102 S.Ct. 632 (1981).

814 (Santini Brothers), 208 N.L.R.B. 184 (1974), *enf'd*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818 (1977); *Sheraton-Kauai Corp.*, 177 N.L.R.B. 25 (1969), *enf'd*, 429 F.2d 1352 (9th Cir. 1970). Now, even if they prevail in the Board proceedings, they are left without a meaningful remedy. The economics of the situation have not changed. True, the Board proceedings may have a collateral estoppel effect on the union in a section 303 suit, but the attorneys' fees still make such litigation cost-prohibitive.

In its decision, the Board *assumed* that a section 303 suit was available. It is not at all clear that a section 303 suit is available under the facts of this case. It must be remembered that the Union and the Contractor Associations voluntarily entered into the "hot cargo" provisions of the MLA. Section 303 of the Act provides a civil remedy for violations of section 8(b)(4), the secondary boycott prohibitions of the Act. A voluntary "hot cargo" agreement does not violate the secondary boycott prohibitions. *Carpenters Local 1976* v. *NLRB (Sand Door)*, 357 U.S. 93 (1958).

In 1959, Congress specifically added section 8(e) to the Act to make voluntary "hot cargo" agreements unlawful. Although Congress also amended section 8(b)(4) at that time, it did *not* amend section 303 to provide for a civil remedy for violations of section 8(e). The courts have uniformly held that "the *mere making* of a contract which violates § 8(e) does not in and of itself give rise to a cause of action *for damages*. It is only where the *added* elements of § 8(b)(4) are found to exist that a cause of action for damages accrues." (Emphasis in original). *National Maritime Union* v. *Commerce Tanker Corp.*, 411 F.

Supp. 1224, 1229 (S.D.N.Y. 1976), *aff'd in pertinent part, rev'd on other grounds,* 553 F.2d 793 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977).

This Court discussed the availability of a section 303 suit in *Connell Construction Co.* v. *Plumbers Local 100,* 421 U.S. 616 (1975). The four-member minority expressed the view that, while § 303 was *not* available to remedy a voluntary "hot cargo" agreement, it was the exclusive remedy for "hot cargo" agreements negotiated in violation of § 8(b)(4). Justice Stewart, speaking for the minority, stated:

> If Connell and Local 100 had entered into a purely voluntary "hot cargo" agreement in violation of § 8(e), an injured nonunion . . . subcontractor would have no § 303 remedy because the union would not have engaged in any § 8(b)(4) unfair labor practice. *The subcontractor, however, would still be able to seek the full range of Board remedies available for a §8(e) unfair labor practice.* (Emphasis supplied).

Id. at 648 n. 9 (Stewart, J., dissenting).

The majority in *Connell* did not discuss or dispute the statement of the minority concerning the non-availability of a § 303 suit to remedy a voluntary "hot cargo" agreement. The majority simply held that the labor-law remedies for § 8(e) violations were not exclusive and that, under appropriate circumstances, anti-trust remedies were also available.

Given these holdings there is every indication that the Board has the *sole* responsibility for remedying violations of section 8(e). If that is true, and the Board fails to provide complete relief—as it has in this case—then victims of voluntary "hot cargo" agree-

ments are left without an adequate remedy. It is respectfully submitted that this was not Congress' intent when it made "hot cargo" agreements unlawful.

The task of the Board in applying section 10(c) of the Act is "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Carpenters Local 60* v. *NLRB, supra,* 365 U.S. at 657 (Harlan, J., concurring); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976). And where a legal injury is of economic character, "the general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is measured. The injured party is to be placed, as near as may be possible, in the situation he would have occupied if the wrong had not been committed. *Wicker* v. *Hoppock,* 6 Wall. 94, 99 (1867).

Although the Board possessed the requisite remedial power, it failed to grant an appropriate remedy and thus failed to carry out its statutory obligation. The Court of Appeals below erred in enforcing the Board's Order and the writ of certiorari should be granted.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should

—grant the writ of certiorari and summarily reverse the decision of the Court of Appeals, or

—grant the writ of certiorari, vacate the judgment, and remand to the Court of Appeals for further consideration in view of the Ninth Circuit decision.

Respectfully submitted,

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Appendix

APPENDICES

A. Decision of the District of Columbia Circuit

B. Decision and Order of the National Labor Relations Board

C. Decision of the Ninth Circuit in the companion case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1503

BUILDING MATERIAL and DUMP TRUCK DRIVERS, TEAMSTERS LOCAL UNION No. 36, ETC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, LARRY SHEPARD,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL., *Intervenors*

No. 80-1807

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BUILDING MATERIAL and DUMP TRUCK DRIVERS, TEAMSTERS LOCAL No. 36, *Intervenor*

No. 80-1808

LARRY SHEPARD, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BUILDING MATERIAL and DUMP TRUCK DRIVERS, TEAMSTERS LOCAL No. 36, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, *Intervenors*

Petitions for Review of Orders of the National Labor Relations Board

Argued May 7, 1981

Decided December 4, 1981

Judgment Entered December 4, 1981

Before: McGOWAN and ROBB, *Circuit Judges* and JAMESON*, *United States Senior District Judge* for the District of Montana.

ROBB, *Circuit Judge*: These cases are here on petitions to review the order of the National Labor Relations Board in *Building Material & Dump Truck Drivers, Teamsters Local Union No. 36, etc.*, 249 N.L.R.B. No. 38 (1980). The Board ordered the Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 and the Associated General Contractors, San Diego Chapter, Inc., the San Diego Building Contractors Association, the Engineering and General Contractors Association, and their employer members (the Contractors) to cease enforcing certain provisions of a Master Labor Agreement entered into by the Union and the Contractors in 1977. The Board found that the 1977 Master Labor Agreement required signatory employers to cease dealing with non-union dump truck operators who are independent contractors, thus violating section 8(e) of the National Labor Relations Act. 29 U.S.C. § 158(e) (1976).[1]

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Section 8(e) provides that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with

The Union has petitioned for review of the Board's order, arguing that the Board erred in finding that the truck operators in question are independent contractors. The Associated General Contractors have intervened in support of the Board's order. The California Dump Truck Owners Association, an association of independent dump truck owner-operators, and Larry Shepard, an individual dump truck owner-operator, were charging parties before the Board. They have also petitioned for review, arguing that the remedy awarded by the Board is inadequate. We affirm the Board's order in all respects.

The dispute arises out of the building and construction industry in San Diego County, California. The practice in that industry is that building contractors hire dump truck operators on a day-to-day basis to haul materials to and from construction sites. The contractors generally obtain

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any other person, and any contract or agreement entered into heretofore or hereafter containg [sic] such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

the services of dump truck operators through brokers, who refer hauling jobs to individual operators, handle billing for services rendered, and generally coordinate arrangements between the contractors and the truck operators. The brokers receive a commission based on the amount billed. Larry Shepard, one of the petitioners, is a dump truck owner-operator who generally accepts referrals from the Terra Trucking Company, one of the brokers in the San Diego area. Petitioner California Dump Truck Owners Association is composed of owner-operators who operate through brokers.

Since at least 1965 the Union and the Contractors have negotiated master labor agreements to govern hauling work performed in the San Diego area. There has been a dispute during that same period between the Union and the non-union truck operators over the availability of hauling jobs for non-union truck operators. The Union sought terms in each new agreement to prohibit dealings with non-union operators. The 1977 Master Labor Agreement contained such terms. Section 4 of the Agreement required signatory contractors to transport "all materials . . . to or from or on the site of the work by workmen furnished by the appropriate craft UNION . . . ." Under section 42(B)(1) of the Agreement only union truck operators were cleared by the Union for work with the Contractors. The Agreement also provided that signatory contractors could procure the services of truck operators only through a "person, firm, or corporation . . . signatory to an agreement with the Union". Section 42(B)(2). Other provisions of the Agreement required the Contractors to treat owner-operators as employees, section 42(B)(4), and penalized contractors who failed to comply with the Agreement. Section 42(B)(9)(12)&(13). In short, under the 1977 Agreement the Union enlisted the aid of the Contractors to insure that only signatory brokers received subcontracts and only union truck operators performed hauling services for building

contractors in the San Diego area. The Board found that the Union and the Contractors enforced the Agreement against brokers and non-union dump truck operators.

In November 1977 the Kissinger Trucking Company, a broker, entered into a contract with the Penhaul Company to supply hauling services for a demolition project. Shortly after the project began, Kissinger's manager was informed that Kissinger would be replaced because it was referring non-union truck operators. Penhaul had signed the 1977 Agreement and could not, under the terms of that agreement, contract with a broker that referred non-union truck operators. Kissinger Trucking lost the contract with Penhaul and subsequently signed the 1977 Agreement.

The Agreement was also enforced against Terra Trucking, Larry Shepard's usual broker. Terra Trucking has been a party to master labor agreements since 1974, and so was required by the 1977 Agreement to refer only union truck operators to building contractors. In August 1978 Terra Trucking's president, Fred ReCupido, received a letter from the Union stating that under the Agreement he must not deal with seven non-union truck operators, including Shepard. ReCupido informed the seven truck operators that they must join the Union or make other arrangements for brokerage of their services. Shepard joined the Union under protest. Some of the seven non-union truck operators did not join the Union but continued to accept referrals from Terra Trucking.

In December 1977 the Dump Truck Owners filed a charge with the Board alleging that the Agreement violated section 8(e) of the Act. The charge alleged that the Union and the Contractors had agreed to cease, and had actually ceased, doing business with the non-union dump truck operators. In October 1978 Larry Shepard filed a similar charge against the Union, alleging that the Union had violated

sections 8(b)(4)[2] and 8(e) of the Act by pressuring Terra Trucking not to broker his services because he did not belong to the Union notwithstanding that he is an independent contractor. At the request of the Regional Director,

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[2] Section 8(b) provides that

> It shall be an unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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29 U.S.C. § 158(b) (1976).

Shepard filed a new charge containing only the 8(e) allegation.

In January 1979 the Regional Director consolidated the two charges and issued a complaint alleging only a violation of section 8(e) by the Union and the Contractors. After a full trial the Administrative Law Judge found that the truck operators are independent contractors and not employees under the Act. Thus, the Union and the Contractors violated section 8(e) by agreeing not to do business with the non-union truck operators and their brokers. The ALJ recommended that the Board order the Union and the Contractors to cease and desist from enforcing the unlawful provisions of the Agreement. The ALJ further recommended that the Union and the Contractors be ordered to make whole those truck operators who were compelled to join the Union and pay dues, initiation fees, assessments, and contribute to Union trust funds.

On exceptions and briefs the Board affirmed the ALJ's findings and conclusions, as relevant here, but deleted the make-whole remedy recommended by the ALJ. The Board ordered the Union and the Contractors to cease enforcing the unlawful portions of the Agreement and to post notices. The Union, Mr. Shepard, and the Dump Truck Owners petition for review and the Board petitions for enforcement of its order.

The first question presented by the petitions for review is whether the Board correctly found that the Union and the Contractors violated section 8(e) of the Act by agreeing not to deal, and ceasing to deal, with certain brokers and non-union truck operators. Section 8(e) prohibits "any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer".

29 U.S.C. § 158(e) (1976).[3] This section of the Act has been interpreted by the Supreme Court to prohibit agreements calculated to satisfy "secondary" union objectives, *i.e.*, those objectives which are not "addressed to the labor relations of the contracting employer *vis-a-vis* his own employees". *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644-45 (1967). Agreements which limit the employer, here the Contractors, to subcontracting with businesses that recognize the union or have a union contract violate section 8(e). *Truck Drivers, Local 413 v. NLRB*, 118 U.S. App. D.C. 149, 158, 334 F.2d 539, 548 (1964). Thus, a provision in an agreement which is designed to compel independent contractors to become union members as a condition of doing business with a party to the agreement is unlawful because it restricts the employer in his dealings with other businesses. *Local 814, International Brotherhood of Teamsters v. NLRB*, 167 U.S. App. D.C. 387, 389-90, 512 F.2d 564, 566-67 (1975), *cert. denied*, 434 U.S. 818 (1977). It is not disputed that the Union and the Contractors may not lawfully enforce the provisions of the 1977 Agreement which restrict dealings with truck operators who are independent contractors. However, the Union contends that the Board erred in finding that the truck operators are independent contractors. The truck operators, says the Union, are employees of the brokers. We agree with the Board.

Section 2(3) of the Act, 29 U.S.C. § 152(3) (1976), defines "employee" as excluding "any individual having the status of an independent contractor". The Act does not define "independent contractor", but Congress intended the Board and the courts to "apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance*

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[3] Section 8(e) also contains a proviso excepting from its coverage all work performed on a construction job site. That proviso is not at issue in these cases.

Co., 390 U.S. 254, 256 (1968) (footnote omitted). In applying agency principles the Board and the courts look at all aspects of an individual's relationship with the putative employer. *Local 777, Democratic Union Organizing Committee, Seafarer's International Union v. NLRB*, 195 U.S. App. D.C. 280, 290-91, 603 F.2d 862, 872-73 (1978). Although no one part of the relationship is determinative, the degree of supervision over the means and manner of performing the task assigned is most important in determining whether a relationship is that of employee or independent contractor. *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271, 279 (9th Cir. 1977); *see Joint Council of Teamsters No. 42 v. NLRB*, 146 U.S. App. D.C. 275, 279, 450 F.2d 1322, 1326 (1971). Under the familiar principles of agency law

> an employer-employee relationship exists when the employer reserves not only the right to control the result to be achieved, but also the means to be used in attaining the result. On the other hand, where the employer has reserved only the right to control the ends to be achieved, an independent contractor relationship exists.

Seafarers International, supra, 195 U.S. App. D.C. at 290-91 n.24, 603 F.2d at 872-73 n.24, *quoting Twin City Freight Inc.*, 221 N.L.R.B. 1219, 1220 (1975). *Accord: City Cab Co. of Orlando, Inc. v. NLRB*, 202 U.S. App. D.C. 261, 264, 628 F.2d 261, 264 (1980). It is the Board which determines independent contractor or employee status in the first instance and we must affirm the Board's determination if it is supported by the record as a whole. 29 U.S.C. § 160(e) (1976); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

Given these legal principles, our task is limited to determining whether the Board's finding that the truck operators are independent contractors is consistent with the

statute and the record. The Board found that the truck operators are not supervised in any manner by the brokers, who simply refer hauling jobs to them. While on the job only the building contractor's personnel tell the truck operators where to deliver a load, and this is done by hand signals. The Board found that the truck operators may accept referrals from more than one broker and are free to negotiate a job rate that is higher than a minimum rate set by a state commission. The truck operators own their trucks, and arrange licensing, insurance, repairs and maintenance. They are responsible for operating expenses, may subcontract job referrals, are personally liable for spillage, pay Social Security taxes as self-employed persons, and often receive payment based on tonnage or mileage as opposed to hourly wages. As the Board concluded, it is fair to describe these truck operators as independent businessmen, free to decide when, whether, and how to work. This being so the Union may not lawfully compel them to become members in order to carry on their business.

The Union challenges the Board's conclusion by pointing to certain facts which are said to indicate a close working relationship between Terra Trucking, a broker, and some of the truck operators that accept referrals from Terra. Specifically, the Union notes that Terra Trucking (1) rents trailers to some truck operators, (2) requires five days notice before a truck operator may cease renting a trailer, (3) insures its rented trailers under a policy that includes a two-hundred-fifty dollar deductible clause, (4) makes fuel available for purchase by the operators, (5) performs all billing and collection services for the truck operators, (6) pays the truck operators each month whether or not the bills are collected and (7) the truck operators are told when and where to report to begin work.

We think these facts and others relied on by the Union do not compel a finding that the truck operators are employees under the Act. None of the facts relied on by the Union establishes that the truck operators have given

brokers the right to control their work. Taken together, the facts indicate that some of the truck operators have a close working relationship with a broker. This suggests that the truck operators have contracted away some aspects of entrepreneurial freedom and that certain risks have been shifted to the brokers; but the record taken as a whole does not compel a conclusion that the truck operators have surrendered control over their operations to the brokers. On the contrary, the record fully supports the Board's conclusion that the truck operators are independent contractors. Because the truck operators are independent contractors, the Union and the Contractors may not enter into an agreement which prohibits dealings with them unless they become union members. The 1977 Agreement was thus invalid and the Board's order against its enforcement is proper.

We turn to the attack on the Board's remedy by Shepard and the dump truck operators. As we have said, the ALJ recommended that the Union and the Contractors be ordered to reimburse the dues, contributions and fees paid by those truck operators who joined the Union. The Board declined to adopt this recommendation. In a footnote to its decision, 248 N.L.R.B. No. 38 at 3 n.2, the Board said "we find that the reimbursement of owner-operators ordered by the Administrative Law Judge would not effectuate the remedial policies of the Act. *See Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al.* [*Mechanical Handling Systems, Inc.*] *v. NLRB*, 365 U.S. 651 (1961)." The Board found "a reimbursement order, typically used to 'make whole' *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations." [Emphasis in original] *Id.* The Board entered a cease and desist order against the Union, combined with notice posting.

Shepard and the dump truck owners complain that the Board failed to give an adequate explanation of its deletion

of the make-whole order and that the cease and desist order is insufficient as a matter of law. We think, however, that the Board's explanation is adequate, and that given our limited authority to disturb the Board's exercise of discretion in such matters we may not interfere.

Section 10(c) of the Act provides that, upon finding that an unfair labor practice has been committed, the Board "shall issue . . . an order requiring . . . such affirmative action . . . as will effectuate the policies of this Act." 29 U.S.C. § 160(c). *See also NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The Board's remedial power "is a broad discretionary one, subject to limited judicial review". *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). In fashioning its remedies, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 612 n.32 (1969). As this court has observed in reviewing a petitioner's contention that a Board remedy did not go far enough:

> Just what remedies are necessary to insure that a decision and order of the Board is effective is a matter largely for the Board's discretion. To successfully attack the Board's remedy one must show that the remedies prescribed by the Board are clearly inadequate in the light of the findings of the Board.

I.U.E., Local 806 v. *NLRB*, 140 U.S. App. D.C. 199, 204, 434 F.2d 473, 478 (1970). Indeed, the Supreme Court has held that a Board remedial order may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

Section 8(e) of the Act makes it an unfair labor practice "for any labor organization and any employer to enter into

any contract or agreement, express or implied, whereby" an employer agrees not to handle products of, or agrees to cease doing business with, any other person. Such contracts or agreements, with certain exceptions not germane here, are unlawful *per se*; evidence of coercion is not necessary to prove a violation of the Section. In the absence of coercion and because union members receive benefits as well as assume burdens, the Board properly finds it inappropriate to order reimbursement of sums paid pursuant to agreements that violate section 8(e); obviously, reimbursement to union members who were not coerced into joining would result in an unjust windfall to them. It was for this reason that the Supreme Court, in the case cited by the Board, *Local 60, United Bhd. of Carpenters and Joiners v. NLRB*, 365 U.S. 651 (1961), held that the Board was not authorized to require the union to refund dues and fees when there was no evidence that any of the employees had been coerced.

Section 8(b)(4)(ii)(A) of the Act provides that it is unlawful for a union to engage in certain conduct if the object thereof is to force or require any employer or self-employed person to join any labor organization or to enter into any agreement prohibited by section 8(e). The Board has properly ordered make-whole remedies where employers or self-employed persons have been subjected to violations of this section. *See Local 814, Teamsters (Santini Bros.)*, 208 N.L.R.B. 184, 201 (1974), *enfc'd*, 178 U.S. App. D.C. 223, 546 F.2d 989 (1976), *cert. denied*, 434 U.S. 818 (1977); *Sheet Metal Workers, Local 223*, 196 N.L.R.B. 55, 57 (1972), *remanded*, 162 U.S. App. D.C. 145, 498 F.2d 687 (1974), *modified*, 214 N.L.R.B. 786 (1974). In the case before us, however, no violation of section 8(b)(4)(ii)(A) was alleged. The Supreme Court has held that a make-whole order "in those circumstances become punitive and beyond the power of the Board." *Carpenters Local 60, supra*, at 655. The petitioners suggest that the Board should have made a *sua sponte* finding of section 8(b)(4)(ii)(A) violations; but

since no such violation was charged a *sua sponte* finding would have been improper.

We think the Board's explanation of its order, although terse, is a sufficient shorthand indication of its reasoning. Finally, we cannot say that the cease and desist order entered by the Board is sufficient to deter further wrongdoing. Both the unions and the contractors' associations will be subject to contempt proceedings for any future violations. We will not disturb the Board's judgment that the order is sufficient to effectuate the policies of the Act.

The petitions for review are denied and the Board's order will be enforced in full.

So ordered.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Associated General Contractors of America, San Diego Chapter, Inc., San Diego Building Contractors Association; Engineering and General Contractors Association *and* California Dump Truck Owners Association.

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Larry Shepard and Terra Trucking Company, Party to the Contract. Cases 21-CE-197 and 21-CE-220

May 8, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On October 30, 1979, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, both Respondent Union and Respondent Associations filed exceptions and supporting briefs. Charging Party California Dump Truck Owners Association filed a brief in reply to the exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has de-

cided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

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[1] We disavow statements in the Administrative Law Judge's Decision with respect to secs. 4 and 4.4 of Respondents' Master Labor Agreement (MLA) which suggest that offsite activity is *per se* secondary activity within the meaning of Sec. 8(e) of the Act. The jobsite limitation in the construction industry proviso to Sec. 8(e) has no relevance to the primary or secondary nature of activity as defined by the standard set forth in *National Woodwork Manufacturers Association, et al.* v. *N.L.R.B.*, 386 U.S. 612 (1967). We agree with the Administrative Law Judge that sec. 4.4 has as its object secondary activity, but this is so because it contains a union referral provision directed at furthering general union objectives and regulating labor policies of employers other than those who are parties to the agreement. See *Local 585 of the Brotherhood of Painters, Decorators & Paper Hangers of America, AFL-CIO and Galveston Building and Construction Trades Council (Falstaff Brewing Corporation)*, 144 NLRB 100, 105 (1963). The fact that secs. 4 and 4.4 cover offsite work means only that any related secondary provisions in the MLA are not entitled to protection under the construction industry proviso.

Chairman Fanning agrees that the 8(e) proviso does not protect the secondary restrictions here insofar as they affect the work of deliveries to and from the jobsite. He does not agree that proviso protection is inapplicable to the work of repairing construction equipment on the jobsite. See his dissenting opinion in *International Union of Operating Engineers, Local Union No. 12 (Acco Construction Equipment, Inc.)*, 204 NLRB 742 (1973).

[2] In accord with past Board practice, we shall divide the recommended Order into separate sections for Respondent Union and Respondent Associations. In addition, we shall delete the injunctive language contained in par. 1(c) of the recommended Order. Such language is not usually included in Board orders dealing with 8(e) violations which do not directly involve employees' Sec. 7 rights. Finally, we shall delete language in the recommended Order requiring Respondents, jointly and severally, to reimburse dump truck owner-operators for the payment of initiation fees, dues,

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that:

A. Respondent Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, San Diego, California, its officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing sections 4.4, 42(B)(1), 42(B)(2), 42(B)(3), 42(B)(4), 42(B)(9), 42(B)(11), 42(B)(12), and 42(B)(13) of the Master Labor Agreement for San Diego County to the extent found unlawful herein.

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and contributions deducted for union benefit funds as a result of the enforcement of unlawful secondary provisions in Respondents' Master Labor Agreement. The Board has on one occasion adopted without comment an Administrative Law Judge's recommended Order containing such a remedy. *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.)*, 208 NLRB 184, 201 (1974). In the present case, however, there is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by Respondents. Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators ordered by the Administrative Law judge would not effectuate the remedial policies of the Act. See *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al.* [*Mechanical Handling Systems, Inc.*] v. *N.L.R.B.*, 365 U.S. 651 (1961).

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix A." [Omitted,] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent Union's authorized representative, shall be posted by said Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to said Regional Director sufficient copies of the aforementioned notice for posting at the premises of Associated General Contractors of America, San Diego Chapter, Inc., San Diego Building Contractors Association, Engineering and General Contractors Association, their respective employer-members, and Terra Trucking Company, if willing.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

B. Respondents Associated General Contractors of America, San Diego Chapter, Inc., San Diego Building Contractors Association, Engineering and General Contractors Association, and their employer-members, San Diego, California, their officers, agents, succesors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing sections 4.4, 42(B)(1), 42(B)(2), 42(B)(3), 42(B)(4), 42(B)(9), 42(B)(11), 42(B)(12), and 42(B)(13) of the Master Labor Agreement for San Diego County to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their places of business copies of the attached notice marked "Appendix B." [Omitted.] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by authorized representatives of Respondent Associations, shall be posted by Respondent Associations and their employer-members immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Associations and their employer-members to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent Associations have taken to comply herewith.

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in San Diego, California, on August 27, 1979. The charge in Case 21-CE-197 was filed on December 19, 1977, by California Dump Truck Owners Association (CDTA). The charge in Case 21-CE-220 was filed on October 20, 1978, by Larry Shepard,[1] an individual. By order dated January 29, 1979, the Regional Director for Region 21 of the National Labor Relations Board consolidated said two cases for hearing. The complaint, issued January 29, 1979, alleges that Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union), and Associated General Contractors of America, San Diego Chapter, Inc. (AGC); San Diego Building Contractors Association; Engineering and Gen-

[1] Individuals are referred to herein by their last names.

eral Contractors Association (Associations) violated Section 8(e) of the National Labor Relations Act as amended.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Shepard, CDTA, Union, and Associations.

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent Associations, and each of them, are associations comprised of various employers who are engaged in business as contractors or subcontractors in the building and construction industry in southern California, which exist for the purpose of, and do engage in, collective bargaining on behalf of their respective employer-members with various labor organizations, including Respondent Union. The employer-members of Associations, in the aggregate, annually purchase and receive goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

I find that Associations and their employer-members are employers engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) and Section 8(e) of the Act.

II. The Labor Organization Involved

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Background[2]

The basic dispute among the parties involves the question of whether or not the collective-bargaining agreement involved herein legally can treat owner-operators of dump trucks as employees of contractors for the purposes of that agreement. The dispute and its similar predecessors are not new to judicial and NLRB processes; they have been considered in many earlier decisions and opinions. However, the genesis of the controversy goes back as far as 1965, when the Union proposed for inclusion in the collective-bargaining agreement then being negotiated, language similar to that now being considered. The language as proposed was not, however, included within the agreement. That language later, as expanded, was insisted upon by the Union, and included in agreements of 1972, 1974, and in the current 1977-80 agreement.

In its Decision of January 17, 1973, based upon representation proceedings, the Board held in *Contractor Members of the Associated General Contractors of California, Inc.*, 201 NLRB 311, that owner-operators were "employees" within the meaning of the Act. The Board reiterated that position on September 23, 1975, in *Associated General Contractors of California, Inc. etc.*, 220 NLRB 540, an unfair labor practice case. In December 1977, the Court of Appeals for the Ninth Circuit reversed the Board, held that the owner-operators were independent contractors rather than employees, and remanded the case to the Board. *Associated General Contractors, etc.* v. *N.L.R.B.*, 564 F.2d 271 (1977). In its Supplemental Decision and Order dated

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[2] This background summary is based upon testimony and evidence that is not in dispute, and is based in part upon General Counsel's brief. The transcript has been carefully reviewed, with the facts summarized herein having been drawn from the transcript and its accompanying exhibits.

December 8, 1978, the Board stated "we conclude that the owner-operators who drive the trucks herein are independent contractors and not employees." Further, the Board vacated its Decision reported in 201 NLRB 311, 209 NLRB 363, and 209 NLRB 366, and dismissed the representation petition. *Associated General Contractors of California, Inc.*, 239 NLRB 686 (1978).

In November 1978, prior to issuance of the Board's Supplemental Decision and Order dated December 8, 1978, the parties to the collective-bargaining agreement of 1977-80 amended their agreement, partially in response to objections raised by the complainants in *Associated General Contractors of California, Inc.*, 239 NLRB 686. Further, the Union executed a settlement agreement in Case 21-CA-195 (Biddle Carter), and agreed to post a notice limiting the force and effect of the subcontracting provisions of the Master Labor Agreement (MLA). That settlement agreement presently is pending before the Board.

Provisions of the 1977-80 MLA, some of which the parties amended, and which are the basis of the controversy herein, are as follows:

SECTION 4

WORK COVERED

Work covered by this Agreement shall include all job-site work performed by the EMPLOYER or its subcontractor for the construction, in whole or in part, or the improvement or modification thereof, any building structure or other work and operations which are incidental thereto, and the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities used in connection with the performance of the aforementioned jobsite work and services, and shall include without limitation the following types of classes of work:

• • • • •

4. So far as it is within the control of the EMPLOYER or his subcontractor, all materials, supplies and equipment used on the job shall be transported to or from or on the site of the work by workmen furnished by the appropriate craft UNION signatory hereto. Nothing herein contained shall be construed to prohibit the normal delivery of freight by common carrier.

* * * * *

SECTION 42
TEAMSTER WORKING RULES

* * * * *

B. OWNER-OPERATOR:

1. The EMPLOYER may obtain trucks or equipment from any source, however, the operators on such trucks or equipment will be properly cleared before starting to work on the second day. The Owner-Operators of such trucks or equipment must furnish proof of legal or registered ownership. In order for the Owner-Operator to be properly cleared, he must present himself and proof of legal or registered ownership at the UNION'S office, and once properly cleared, such clearance is valid in San Diego County until there is a change in the Owner-Operator's equipment status.

2. The EMPLOYER may procure Owner-Operators from a person, firm, corporation or other business entity which is signatory to an agreement with the Union, and who are making proper fringe benefit payments. Such person, firm, corporation or other business entity will be considered for the purposes of this Agreement to be a subcontractor.

Should any portion of the Owner-Operator language contained in this Agreement be ruled null and void or unenforceable by a court of competent jurisdiction or the NLRB, said ruling affecting that section of the Owner-Operator language shall immediately be

deemed to be incorporated into this Agreement until the provisions of Section 10 (General Saving Clause) are invoked.

3. The Contractor expressly reserves the right to control the manner, time, means and details of, and by which, the Owner-Operator performs his services, as well as the ends to be accomplished, and shall be the sole judge of the capability of the Owner-Operator's equipment to perform the work required to be performed and may, if the Contractor determines that the Owner-Operator equipment is not capable of performing the work required to be performed, terminate such Owner-Operator's services. Failure to work the day or one-half (½) day out, as directed, shall terminate the Owner-Operator's employment, and shall be paid only for actual time worked prior to such failure. The Contractor shall not pay for time spent by the Owner-Operator in repairing, servicing, or maintaining his equipment after termination of employment or before or after his shift or half-shift, as the case may be.

4. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and, as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him, except as provided elsewhere in the Section and except that in the event that it is determined that the services of an Owner-Operator were terminated, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that the Owner-Operator shall not be subject to the provisions of paragraphs 1, 2, 3, 4, 4(a), 4(b), 4(e) of Section 26 of this Agreement.

* * * * *

9. It is further mutually understood and agreed that the intent of this Section is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes, and conditions as provided in this Master Agreement.

* * * * *

11. Notwithstanding any other provision of this Agreement, this Section 42 shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done under Section 4.

12. If the EMPLOYER through a three man committee, selected in accordance with the procedure described in the Stewards Clause contained in Section 14, is found violating any portion of this section, the EMPLOYER shall immediately pay for each Owner-Operator with respect to whom the EMPLOYER is in violation, a sum equal to one day's pay at the highest hourly rate covering wage and fringe benefit costs under this Agreement for each day or portion thereof the violation occurred, such money to be made payable to the Lukemia Society, San Diego Chapter, by check and promptly mailed to Teamsters Local No. 36.

13. When a truck or piece of equipment is driven or operated by its owner and is used on work covered by this Agreement, the Owner-Driver or operator of said truck, or piece of equipment shall receive a rate of pay not less than that specified in this Agreement and shall be subject to the terms and conditions of this Agreement.

At the hearing herein, General Counsel introduced the testimony of Shepard; Fred ReCupido, a truck broker referred to as a prime, or overlying, carrier; and Donna Jean

Herring, general manager of Kissinger Trucking Company (Kissinger), a truck broker and prime carrier. Shepard, ReCupido, and Herring testified in detail concerning the manner in which truck owner-operators work for contractors through broker arrangements. Their testimony was not contradicted, and is credited.

Kissinger operates a trucking business, and acts as a broker for owner-operators in San Diego County. Kissinger owns its own trucks, and employs four drivers. The trucks have signs reading "Kissinger Trucking" on the vehicles. The four drivers are employees within the meaning of the Act, and their employment is conducted pursuant to usual employer-employee statutory and other requirements. Kissinger's business as a truck broker is carried on separately from its business as a trucker for hire.

Kissinger, in its broker capacity, contracts with owner-operators of dump trucks. Kissinger enters into subhaul agreements with owner-operators. Kissinger has such subhaul agreements with from 75 to 100 owner-operators. The subhaul agreements are not exclusive, and the owner-operators are permitted to, and do, have subhaul agreements with other brokers. Kissinger's subhaul agreement only requires that an owner-operator possess a California Public Utilities Commission (PUC) dump truck permit, carry insurance naming Kissinger as an additional insured, and possess a truck. Kissinger possesses no ownership interest in any of the owner-operator's equipment. Unlike its own trucks, Kissinger does not pay for the fuel, insurance, or maintenance of the owner-operators' truck. Kissinger does not pay or provide repair parts for the owner-operator's truck.

Owner-operators call Herring for work, or Herring calls them. She tells them where to report for the next day's work, and provides a freight bill. Owner-Operators may refuse these dispatches, and often do when already working for another broker. Kissinger collects the freight char-

ges from the customers, and pays the owner-operator 95 percent thereof. Owner-Operators are free to substitute another driver on a dispatch.

In November 1977 Kissinger entered into a contract with the Penhall Company to haul rubble from a demolition project to a dump site some 10 miles away. Kissinger dispatched several owner-operators to the project when it commenced in December 1977. Just after the project began, Jack Hobbs, Penhall's superintendent, called Herring and told her that a Teamsters business agent said that Kissinger could not do the job because it was nonunion. Hobbs told Herring that, unless she could find a way to satisfy the Teamsters, he would remove Kissinger from the job and get a union contractor who could perform. Herring called Bill Burke of the AGC, and asked him why Kissinger could not haul on the Penhall project. Burke told Herring that because Penhall was a signatory to the MLA, and since Kissinger was nonunion, it could not haul on the job. Kissinger was removed from the Penhall job. Subsequently, in February 1978, Kissinger signed the Master Labor Agreement.

ReCupido operates Terra Trucking Company (Terra) as a sole proprietorship. Terra operates as a broker for owner-operator dump trucks, and also rents dump trailers. ReCupido maintains contact with approximately 100 to 150 contractor customers, 20 to 30 of whom are regular, and for whom Terra provides owner-operator trucks. Terra, in turn, has subhaul agreements with from 200 to 250 owner-operators, of whom 25 to 30 he regularly uses. These subhaul agreements are not exclusive, and owner-operators can, and do, have subhaul agreements with other brokers. Terra bills the customers for the owner-operators' services, and remits 95 percent of the bill to the owner-operator, keeping 5 percent as a broker's fee. If Terra rents a trailer to the owner-operator, it deducts 20 percent of the bill as trailer rental. Before entering into a subhaul agreement,

Terra only requires that the owner-operator have a PUC license and carry insurance naming Terra as an additional insured. Owner-operators are not required to take a physical examination, fill out an employment application, or fill out an Internal Revenue W-4 form. ReCupido does not go into the field to supervise the work of owner-operators. Owner-operators have no set hours or standard workday, and are not required to call in to Terra if a job ends early. Owner-operators purchase their own fuel. Terra does not deduct any payroll taxes from owner-operators' revenue, and does not carry workmen's compensation insurance for the owner-operators. Owner-operators provide their own insurance. Terra has no financial interest in any of the owner-operators' equipment. Terra, through ReCupido, tells the owner-operators where to show up for the next day's work, and neither specifies the route to take nor compensates the owner-operators for transit time. Owner-operators can negotiate a higher rate once on a job. Owner-operators can, and have, substituted drivers and jobs.

ReCupido signed a "short-form" agreement pursuant to provisions of the San Diego County MLA in 1974, when he was engaged in business as an owner-operator. That agreement renews itself from year to year. In August 1978, ReCupido received a letter from the Union stating that several employees, including Larry Shepard, were not members in good standing and requested that Terra remove them from employment until properly cleared.[3] ReCupido told the owner-operators that they would have to join the Union (Local 36), or he would not utilize their services. ReCupido credibly testified that, although this was the first correspondence requesting that that owner-operators join Local 36, there had been a constant battle with Local 36 since 1975 as to whether owner-operators should join the Union. All of the owner-operators joined Respondent Union in September 1978. At no time subsequent to September

[3] G.C. Exh. 6.

1978 has any agent of Respondent Union contacted ReCupido to inform him that owner-operators do not have to be members of Respondent Union.

Shepard is an owner-operator who uses Terra for brokering services. Shepard owns his own tractor, which he is financing through an Orange County bank. Shepard has a subhaul agreement with Terra. ReCupido usually calls Shepard and offers him several jobs from which to choose. Shepard can, if he so desires, refuse to take the jobs that are offered. Shepard estimated that he hauled for more than 100 customers during the year preceding the hearing. Shepard submits a copy of the freight bill for each job to ReCupido, who deducts 5 percent for a broker's fee and 20 percent for trailer rental, and remits the remainder to him. Shepard pays the sales tax on his tractor; pays for his own fuel, license fees, and Federal highway use tax; does his own maintenance; pays his own parking rental fees; and pays his taxes quarterly as self-employment tax. Shepard is not covered by workmen's compensation or state disability. He pays for his own PUC permit. He is legally responsible for any spillage which he may cause. He can negotiate a higher rate for a job, and can substitute another driver on a job. He schedules and controls his own vacation.

While on a job, the customer tells Shepard where to deliver his load. The customer's agent tells Shepard where to dump. However, Shepard's contact with the agent is very brief and may consist only of hand signals. Shepard has no fixed hours, and while lunch breaks usually are schedules to coincide with the customers, Shepard can elect to work through the lunch hour. Shepard is not supervised on the job by ReCupido, whom he sees very infrequently. Shepard never has hauled on a job which required him to load and dump all within the confines of a single project.

In September 1978, Shepard joined the Union because of the letter Local 36 sent ReCupido. (G. C. Ex. 6). Shepard

went to Respondent Union's hall and asked Union Agent Hugh McDonald why he, an independent businessman, had to join the Union. McDonald replied it was because Re-Cupido had signed a short-form agreement. Shepard joined and paid his dues and fees under protest.

Issues

The principal issue is whether or not the contractual provisions quoted above violate Section 8(e) of the Act. In order to resolve that issue, it must be determined whether or not owner-operators are independent contractors; whether or not the contractual provisions quoted above have a secondary object precluded by Section 8(e) of the Act; and, if the provisions are secondary in nature, whether or not they are permissible under the construction industry proviso of Section 8(e).

A. *The Independent Operator Issue*

Independent contractors are not included within the provisions of the Act defining "employee."[4] The status of owner-operators such as Shepard was determined by the Court of Appeals for the Ninth Circuit in 1977, when the opinion was filed in *Associated General Contractors, etc.* v. *N.L.R.B., supra.* The Board later vacated its earlier determination that the owner-operators were employees, and held that they were independent operators. *Associated General Contractors of California, Inc.*, 239 NLRB 686. Those two pronouncements, judicial and Board, did not specifically apply to owner-operators in San Diego County, who are involved in this case. However, Respondents herein did not contend at the hearing, nor does the record show, that owner-operators in this case occupy a status, or conduct their business, in a manner different from owner-operators outside the San Diego County area.

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[4] Sec. 2(3) of the Act.

The Ninth Circuit considered, *inter alia*, the following factors in reaching its determination that owner-operators are independent contractors. Hauls are for contractors. Hauls may be arranged personally or though overlying carriers (brokers). Subhaul agreements are not exclusive arrangements. Overlying carriers do not supervise "in any significant fashion" the work of owner-operators. Broker referrals may be rejected by owner-operators. The relationship between owner-operators and contractors is "short-lived." Minimum fees are established by the California PUC, but owner-operators may negotiate for higher rates. Owner-operators may be paid by the hour, or on mileage and tonnage rates. Owner-operators are not paid for time when their equipment is inactive. Contractors make no employee deductions from pay of owner-operators. Owner-operators keep track of their own time, subject to audit. PUC requires that owner-operators obtain permits from the PUC, be bonded, and carry liability insurance. Owner-operators are responsible for overloading and spillage. Owner-operators bear the entire cost of their enterprises, including the cost of trucks, equipment, and tools, and pay all their own maintenance and operational expenses. Owner-operators independently may hire drivers, or subcontract work to other owner-operators. On site conduct is coordinated with contractor personnel, relative to breaks and dump areas.

It is readily apparent from a review of owner-operator functions described at the hearing herein, and summarized *supra*, that the relationship among owner-operators, brokers, and contractors in this case practically is indentical to that described by the Ninth Circuit when it reached its determination that owner-operators are independent contractors. There is no reasonable basis on which to conclude that the owner-operators here involved are employees. The law of *Associated General Contractors, etc.* v. *N.L.R.B., supra*, and *Associated General Contractors of California, supra*, puts this issue to rest.

B. *The Secondary Conduct Issue*

Section 8(e) of the Act, sometimes referred to as the "hot-cargo" section, was enacted into law in 1959 as a part of the Landrum-Griffin Act, which amended the National Labor Relations Act. The portion of Section 8(e) that is relevant to this issue is as follows:[5]

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

Section 8(e) addresses itself to what the Congress considered a defect in the law prior thereto, i.e., the law that permitted contractual provisions directed to unoffending employers, rather than to conditions of work of the contracting employer. It was the intent of Congress in enacting Section 8(e) to preclude secondary boycotts, and a literal reading of the statute indicates that all agreements for secondary action are covered. However, judicial pronouncements have resulted in the allowance of some secondary agreements as being outside the intent of the statute. *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S 612 (1967), rehearing denied 387 U.S. 926, sets forth the basic judicial guidelines in determining the nature of contracts permissible under Section 8(e). That case approves subcontractual limitations on an employer's actions, provided the purpose thereof is to protect and preserve work standards and opportunities of the bargaining unit. These clauses sometimes are referred to as "union

[5] The proviso portion of the section is discussed *infra*.

standards" clauses However, provisions that limit subcontracting to employers who are parties to union contracts are secondary and illegal, since their purpose is to further union causes outside the ambit of the unit. Such clauses sometimes are referred to as "Union signatory" provisions. Many cases have been decided by courts and the Board pursuant to the guidelines of *National Woodwork*, with some types of contractual provisions being found lawful, and some being found unlawful. However, those guidelines have not been disturbed and remain the law. In applying Section 8(e) to specific factual situations, established principles relating to secondary boycotts are applied.

General Counsel has alleged that certain provisions of MLA involved in this controversy are illegal under Section 8(e) of the Act. It is necessary to examine those provisions individually, as follows:

SECTION 4

WORK COVERED

> Work covered by this Agreement shall include all job-site work performed by the EMPLOYER or its subcontractor for the construction, in whole or in part, or the improvement or modification thereof, any building structure or other work and operations which are incidental thereto, and the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities used in connection with the performance of the aforementioned jobsite work and services, and shall include without limitation the following types of classes of work:
>
> * * * * *
>
> 4. So far as it is within the control of the EMPLOYER or his subcontractor, all materials, supplies and equipment used on the job shall be transported to or from or on the site of the work by workmen furnished by the appropriate craft UNION signatory here-

to. Nothing herein contained shall be constructed to prohibit the normal delivery of freight by common carrier.

Section 4.4 is the heart of this section, is an important part of the MLA as a whole; and continues a controversy that extends back at least as far as 1965. The fact that section 4.4 has as its object secondary activity is apparent. Delivery of materials, supplies, and equipment is not jobsite work within the meaning of the provisio to Section 8(e).[6]

So far as the "work covered" paragraph is concerned, the language thereof incorporates section 4.4 by stating that the work described as "jobsite work" shall "include without limitation the following types of classes of work." Not only does that work description unlawfully include deliveries to the site it also embodies within the language an activity that has been held to constitute offsite, thus secondary, activity, i.e., the maintenance and repair of *all* equipment. Dealer repairs were held in *Acco Construction Equipment, Inc.*, v. *N.L.R.B.*, 511 F.2d 848 (9th Cir. 1975), to constitute secondary activity within the coverage of Section 8(e) of the Act, outside the proviso thereto.

Section 42(B)(11) of the MLA provides:

11. Notwithstanding any other provision of this Agreement, this Section 42 shall be applicable only to

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[6] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helper of America, Local 294 (Island Dock Lumber, Inc.)*, 145 NLRB 484 (1963), enfd. in pertinent part 342 F.2d 18 (2d Cir. 1965); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helper of America, Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Rexford Sand and Gravel Co.)*, 195 NLRB 379 (1972); *Local Union No. 282 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (D. Fortunato, Inc.)*, 197 NLRB 673 (1972).

> Owner-Operators performing (or who, upon their employment, will be performing) work to be done under Section 4.

This provision is dependent upon, and specifically incorporates, sections 4 and 4.4 discussed *supra*. Those sections being unlawful, this section, too, is unlawful to the extent of its dependence upon sections 4 and 4.4

Section 42(B)(1) of the MLA provides:

> B. OWNER-OPERATOR
>
> 1. The EMPLOYER may obtain trucks or equipment from any source, however, the operators on such trucks or equipment will be properly cleared before starting to work on the second day. The Owner-Operators of such trucks or equipment must furnish proof of legal or registered ownership. In order for the Owner-Operator to be properly cleared, he must present himself and proof of legal or registered ownership at the UNION'S office, and once properly cleared, such clearance is valid in San Diego County until there is a change in the Owner-Operator's equipment status.

This provision restricts and penalizes both signatory contractors and independent owner-operators. Contractors are limited in their choice of owner-operators, and owner-operators are precluded from working for signatory contractors unless, in both instances, the owner-operators first have submitted themselves to, and have been "cleared" by, the Union. This control device is contrary to the provisions of Section 8(e) of the Act, and is illegal.[7]

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[7] *Local 585 of the Brotherhood of Painters, Decorators & Paper Hangers of America, AFL-CIO, et al. (Falstaff Brewing Corporation)*, 144 NLRB 100 (1963), and cases cited therein.

Section 42(B)(2) of the MLA provides:

> 2. The EMPLOYER may procure Owner-Operators from a person, firm, corporation or other business entity which is signatory to an agreement with the Union, and who are making proper fringe benefit payments. Such person, firm, corporation or other business entity will be considered for the purposes of this Agreement to be a subcontractor.
>
> Should any portion of the Owner-Operator language contained in this Agreement be ruled null and void or unenforceable by a court of competent jurisdiction or the NLRB, said ruling affecting that section of the Owner-Operator language shall immediately be deemed to be incorporated into this Agreement until the provisions of Section 10 (General Saving Clause) are invoked.

The purpose of this provision patently is to limit contractors' choice of truck brokers, to those brokers who are signatories to contracts with the Union. Under the law of *National Woodwork Manufacturers Association* v. *N.L.R.B.*, *supra*, as later interpreted in *inter alia*, *International Union of Operating Engineers, Local Union No. 12, AFL-CIO (Robert E. Fulton)*, 220 NLRB 530 (1975), *General Teamsters, Chauffeurs, Warehousemen and Helpers Local 982, et al. (J. K. Barker Trucking Co., et al.)*, 181 NLRB 515 (1970), such a union signatory clause is within the proscriptions of Section 8(e) of the Act, and is illegal.

Section 42(B)(4) of the MLA provides.

> 4. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him, except as provided elsewhere in the Section and except that in the event that it is determined that the services of an Owner-Operator were terminated, any payment for time lost shall be limited

to the wage and fringe benefit payments provided in this Agreement, shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that the Owner-Operator shall not be subject to the provisions of paragraphs 1, 2, 3, 4, 4(a), 4(b), 4(c) of Section 26 of this Agreement.

As discussed *supra*, the Union has, since at least 1965, been desirous of treating owner-operators as employees of signatory contractors, and toward that end, has brought economic pressure against the Associations in order to embody in contracts language to attain that goal.

The provision quoted above is a part of the Union's continuing efforts to achieve its goal of unionization of owner-operators. Under this provision an owner-operator has only two choices, i.e., he can become an employee against his will and thereby subject himself to all the limitations[8] of such status, or he can be precluded from hauling for signatory contractors, thereby effectively taking himself out of the hauling business.

As discussed *supra*, owner-operators involved in this controversy are independent entrepreneurs. The attempt by Respondents Union and Associations to impose union membership on those owner-operators is aimed at the labor policies of businesses that are not a part of labor relations between the Union and its signatory contractors. Such an attempt violates Section 8(e) of the Act, since it is a secondary action.[9]

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[8] Including contractual limitations embodies in the MLA.

[9] *A. Duie Pyle, Inc.* v. *N.L.R.B.*, 383 F.2d 722 (3d Cir. 1967), cert. denied 390 U.S. 905 (1968); *Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (S & E. McCormick, Inc.)*, 199 NLRB 531 (1972); *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Santini Brothers, Inc.*, 208 NLRB 184 (1974).

Section 42(B)(9), (12), and (13) of the MLA provide:

> 9. It is further mutually understood and agreed that the intent of this Section is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes, and conditions as provided in this Master Agreement.
>
> 12. If the EMPLOYER through a three man committee, selected in accordance with the procedure described in the Stewards Clause contained in [Section] 14, is found violating any portion of this section, the EMPLOYER shall immedaitely pay for each Owner-Operator with respect to whom the EMPLOYER is in violation, a sum equal to one day's pay at the highest hourly rate covering wage and fringe benefit costs under this Agreement for each day or portion thereof the violation occurred, such money to be made payable to the Lukemia Society, San Diego Chapter, by check and promptly mailed to Teamsters Local No. 36.
>
> 13. When a truck or piece of equipment is driven or operated by its owner and is used on work covered by this Agreement, the Owner-Driver or operator of said truck, or piece of equipment shall receive a rate of pay not less than that specified in this Agreement and shall be subject to the terms and conditions of this Agreement.

The foregoing provisions are restrictions upon signatory employers' right to do business with owner-operators as independent contractors. The quoted provisions subject owner-operators to the pay, terms and conditions of the MLA. As discussed *supra*, the California PUC sets minimum rates owner-operators may charge, but the latter legally can, and do, negotiate higher rates on some hauling jobs. The first and last sections of the MLA quoted above

substitute contractual pay for negotiated pay, without the owner-operators ever having had a part in such a fundamental change. Such restrictions of signatory contractors, and their effect upon owner-operators, fall squarely within the proscriptions of secondary activity set forth in Section 8(e) of the Act.

As discussed in General Counsel's brief, section 42(B)(12) is a penalty clause applicable to signatory contractors who do business with owner-operators as independent contractors. Clearly, the penalty is intended to force signatory contractors to make certain that owner-operators who work for those contractors become employees subject to all terms and conditions of the MLA. Such a penalty clause has an effect similar to the clause considered in *Orange Belt District Council #48, AFL-CIO (Calhoun Drywall Company)*, 153 NLRB 1196 (1965), enfd. 365 F.2d 540 (D.C. Cir. 1966), and is of a secondary nature in violation of Section 8(e) of the Act.

C. *The Proviso Issue*

Section 8(e) states, *inter alia:*

> Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

As discussed *supra*, several provisions of the MLA either are patently, or in effect, secondary in nature since they are intended to, and do, reach the activities of owner-operators as independent contractors outside the labor relations between the Union and its signatory contractors. Those provisions violate Section 8(e) of the Act, unless they are excluded from that section by the proviso clause.

The key determination here is whether or not the work of the owner-operators is "to be done at the site of the construction . . . ."

The legislative history of the proviso shows that Congress intended it to be applied solely to work done, or to be done, directly at the site of construction. That history is epitomized by the House Conference Report[10] which stated as follows:

> It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from Section 8(e) agreements relating to supplies and materials or other products shipped or otherwise transported to, and delivered, on the site of construction.

The Board and the courts consistently have decided cases in the manner indicated by the wording of the statute, and by its legislative history, i.e., narrowly and strictly. Indicative of those decisions are *Teamsters Local 294 (Island Dock Lumber), supra* (delivery of ready mix concrete to a construction site); *Local 294, Teamsters (Rexford Sand and Gravel), supra* (delivery of sand and gravel to a construction site). *Acco Construction Equipment Inc.* v. *N.L.R.B., supra* (dealer maintenance and repair of equipment on a construction site); *Operating Engineers, Local 12 (Robert E. Fulton), supra* (hauling sand to a construction site).

Uncontradicted testimony established that the work of owner-operators involved in this controversy exclusively consisted of hauling to and from construction sites. In no instance did the work involve hauling limited to the confines of the worksite. Under such circumstances, it is clear that the proviso is inapplicable to this issue, and that resolution

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[10] H. Rept. 1147, 86th Cong., 1st sess. 39.

of the controversy must be made upon the basis of secondary considerations under Section 8(e) discussed *supra*.

Respondent's Defenses

1. Respondent Union contends that "on or about August 10, 1978, it came to the attention of Teamsters Local 36 that certain individuals whom Teamsters 36 believed to be employees of Terra Trucking were not members in good standing of the Teamsters Union," and infers that Teamsters Local 36 learned of the individuals through monthly reports filed with the Union and its health and welfare trust fund by ReCupido. That contention is given no credence. The history of this controversy, together with the credited testimony of ReCupido and Shepard concerning their contacts with the Union, the reason for and method of submitting reports, and the manner in which owner-operators were forced to join the Union, makes it quite clear that the Union knew what was happening when the reports arrived. The reports, as well as union membership of owner-operators, resulted from illegal provisions of the MLA discussed herein.

2. The Union argues that "the offensive portions of the MLA were excised by the November 1978 amendment," and that the Union settled the Biddle Carter controversy by agreeing not to enforce the subcontracting provisions except with respect to jobsite work, hence, that further action by the Board is not necessary. The Associations concur with that argument. That argument is based upon irrelevant facts. First, the fact of entering into an agreement in violation of Section 8(e) of the Act gives rise to a course of action,[11] regardless of whether or not the offensive language later is deleted or amended. Second, the MLA in its original form was enforced, to the detriment

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[11] *Mary Feifer d/b/a American Feed Company*, 133 NLRB 214 (1961).

of owner-operators, prior to its amendment. Third, the Associations' Burke testified that the amendment never was published to AGC members. Further, there is no evidence that the amendment ever was placed in effect.

3. The Union and the Associations argue that Shepard is an employee of Terra Trucking Co. (ReCupido). This argument is without merit. As discussed *supra*, the Ninth Circuit and the Board have decided that owner-operators doing the same work as Shepard are independent contractors.

4. The Union argues that the MLA's requirement that signatory employers must use union subcontractors is lawful, and cites *Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. (Woelker & Romero Framing, Inc.)*, 239 NLRB 241 (1978), and *Carpenters Local Union #15, et al.*, 240 NLRB 255 (1979), as authority. Those cases are inapplicable to this controversy, since they involve jobsite work. As stated by Administrative Law Judge Welles in *Carpenters Local Union #15:*

> . . . the questions that have arisen before the Board have concerned only whether the construction industry was involved, and whether the work was "job-site" work. These conditions having been met, it is fair to say that, in the Board's view, anything goes.

5. The Union argues that the owner-operators here involved are engaged in jobsite activities. As discussed *supra*, that argument is not in accord with the law.

6. The Associations argue that a "make whole" remedy against the Employer Associations would not effectuate the purposes of the Act. The brief of Associations comments: "Obviously under the fact of this case, if anyone needs a restraining influence it is Local 36, not the Employer Associations." It may well be that the Associations

were forced by economic pressure into an agreement which they disliked and disapproved, but they did sign the contract. That signature, and later enforcement of the provisions of the contract by both the Union and the Associations, subjects the Associations to liability flowing from the contract.

THE REMEDY

Having found that Respondent Union and Respondent Associations have engaged in certain unfair labor practices in violation of Section 8(e) of the Act, I shall recommend that they cease and desist therefrom, and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Union and the Associations enforced provisions of the MLA requiring owner-operators of trucks to make payment to the Union of dues, initiation fees, assessments, and contributions to trust funds in violation of Section 8(e) of the Act, it will be recommended that the Union and the Associations, jointly and severally, make whole all such owner-operators for such payments, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

Upon the basis of the foregoing findings of fact and the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent Employer Associations and their employer-members are, and each of them is, employers engaged in commerce and businesses affecting commerce within the meaning of Section 2(6) and (7) and 8(e) of the Act.

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[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

2. Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into and maintaining the following sections of the Master Labor Agreement for San Diego County, with respect to any work defined in section 4 of said agreement, Respondents Union and Employer Associations have engaged in unfair labor practices within the meaning of Section 8(e) of the Act: sections 42(B)(1), (2), (3), (4), (9), (11), (12), and (13).

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

December 21, 1981

JOINT COUNCIL OF TEAMSTERS, No. 42 v. NLRB; NLRB v. BUILDING MATERIAL AND DUMP TRUCK DRIVERS LOCAL 420; CALIFORNIA DUMP TRUCK OWNERS ASS'N v. NLRB. Nos. 80-7455, 80-7456, and 80-7457.

BEFORE ELY, Senior Circuit Judge, NORRIS, Circuit Judge, and COPPLE*, District Judge.

NORRIS, Circuit Judge: — We are called upon in this case to review an order of the NLRB declaring a provision in a collective bargaining agreement to be an unfair labor practice under § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976). The Board invalidated article XIII of the Master Labor Agreement between unions and contractor-employers in the Southern California construction industry because it prohibited general contractors from hiring non-union dump-truck owner-operators. The unions petition to deny enforcement of the Board's order, and the Board seeks a judgment of enforcement.[1] The owner-opera-

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* The Honorable William P. Copple, United States District Judge for the District of Arizona, sitting by designation.

[1] The general contractors intervene in support of the Board's position; they are represented by the Associated General Contractors of California, Inc., the Building Industry Association of California, the Engineering Contractors Association, and the Southern California Contractors Association. The unions include the Joint Council of Teamsters No. 42, et al. The truck owners are represented by the California Dump Truck Owners Association and the Associated Independent Owner-Operators, Inc. The proceedings below are reported at *Joint Council of Teamsters No. 42*, 248 NLRB 808 (1980).

tors seek an order directing the Board to grant a make-whole remedy requiring the unions to reimburse them for initiation fees and dues paid to the unions, and for income lost by those truck owners who were denied work. We enforce the Board's order, but remand with directions to the Board to fashion a make-whole remedy or show cause why a make-whole remedy is inappropriate.

I.

Section 8(e) prohibits agreements between unions and employers that require a self-employed person to join the union in order to work for the employer.[2] A construction industry proviso to § 8(e) carves out an exception for "work to be done at the site of the construction." Our inquiry is whether the Board erred in ruling that the operation of the owner-operated dump trucks in question is not on-site work within the meaning of the § 8(e) proviso.[3]

The facts are not in dispute. The dump truck operators haul materials from construction sites to remote dump sites, from "borrow" pits to construction sites, and from

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[2] Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), provides that: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . whereby such employer . . . agrees to . . . cease doing business with any other person . . . *Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."

[3] As a preliminary matter, the unions argue that the dump-truck owner-operators are not self-employed independent contractors, as the Board held, but employees of the general contractor. This argument is foreclosed, however, by *Associated General Contractors of California, Inc.* v. *NLRB*, 564 F.2d 271 (9th Cir. 1977), in which this court held that these same dump truck owners are independent contractors.

one construction site to another construction site. The truck owners spend most of their time on public roads away from the construction site. The only time spent at the construction site is during loading and unloading, when the dump truck operator ordinarily remains in his vehicle. *See Joint Council of Teamsters No. 42*, 248 NLRB 808, 816-17 (1980).

On these facts, the Board found that the owner-operators are delivery persons, not construction site workers, and therefore their work is not covered by the on-site proviso. That finding is consistent with Board findings in similar cases involving delivery of goods to a construction site. *See Drivers Local 695 v. NLRB*, 361 F.2d 547, 552 n.19 (D.C. Cir. 1966). In doubtful situations, we give weight to the Board's application of the Act, *NLRB v. Denver Building and Construction Trade Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951); where, as here, the situation is not doubtful, we readily enforce the Board's order.

None of the unions' arguments against the Board's order is persuasive. First, they cite this circuit's recent interpretation of the on-site proviso in *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. v. N.L.R.B.*, 654 F.2d 1301 (9th Cir.) (en banc), *cert. granted*, —— U.S. ——, 102 S.Ct. 90, 69 L.Ed.2d —— (1981). That case is not on point. The only issue decided in *Pacific Northwest* was whether the § 8(e) proviso "renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work *at any construction site* to a firm not having a contract with the signatory union." 654 F.2d at 1304 (emphasis added). In *Pacific Northwest*, where it was undisputed that the workers were engaged in on-site work, the court recognized that "the construction industry proviso narrowed the geographical scope of the [rule allowing secondary tactics] by introducing the job-site limitation." 654 F.2d at 1313.

Second, the unions compare the on-site proviso in § 8(e) to an on-site proviso in the Davis Bacon Act (concerning minimum wages for construction workers on government contracts), arguing that the Federal Wage Appeals Board has held that it includes transportation between a construction site and a remote dump site. *See T. L. James & Co.*, Wage Appeals Board Case No. 69-2 (Aug. 13, 1969). We question the unions' reading of *T. L. James*. The Wage Appeals Board only held that a remote dump site or borrow pit is a part of the construction site. Slip op. at 6. The Board did not explicitly address the issue of transportation between the main site and the remote site. Moreover, we reject the unions' comparison of the two Acts. Neither the legislative history nor the text of the statute suggests that Congress intended § 8(e) to parallel the Davis Bacon Act.

Third, the unions rely on a Ninth Circuit affirmance of an arbitration award where, in the process of interpreting a provision in a collective bargaining agreement, the arbitrator determined that transportation between a construction site and a supply site was on-site work within the meaning of § 8(e). *See La Mirada Trucking, Inc. v. Teamsters Local Union 166*, 538 F.2d 286, 288 (9th Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977). That decision has little bearing on the case before us. In *La Mirada*, the court did not interpret the on-site proviso to § 8(e); the court merely held reasonable the arbitrator's interpretion of a provision in a collective bargaining agreement, which the parties had stipulated to be identical to the on-site proviso of § 8(e). 538 F.2d at 289. Thus, the *La Mirada* court did not hold as a matter of law that transportation between a supply site and a construction site fits within the construction industry proviso.

II.

The truck owners claim that the Board's cease and desist order is an inadequate remedy. They contend that the

Board should also order reimbursement of initiation fees and dues that the truck owners had paid to the union plus compensation for income lost to those truck owners who were denied work.

Although § 10(c) of the Act[4] vests broad discretion in the Board to fashion remedies that effectuate the policies of the Act, *see Fibreboard Paper Products Corporation v. N.L.R.B.*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964), that discretion is not unlimited. *See Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F.2d 848, 852 (9th Cir. 1975). In cases where money has been collected illegally, the Board should order a refund, absent some rational ground for not doing so. *Id.* We hold that the Board has failed to offer a rational ground for refusing to order reimbursement in this case.

A.

The Board's principal reason for denying reimbursement is that the unions neither directly coerced the dump truck owner-operators to pay union fees nor illegally coerced the general contractors to accept article XIII in the collective bargaining agreement.[5] Either form of coercion would have

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[4] Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), provides that "the Board shall . . . take such affirmative action . . . as will effectuate the policies of this subchapter."

[5] The Board offered the following explanation for its denial: "We hereby deny the Charging Party CDTOA's request that we require Respondent Unions to reimburse any owner-operators for payment of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement of unlawful terms in MLA art. XIII. The Board has on one occasion adopted without comment an administrative law judge's recommended Order containing such a remedy. *Local 814, Teamsters (Santini Brothers, Inc.)*, [208 NLRB] at 201. In the present case, however, no evidence has been introduced with respect to alleged

constituted a violation of § 8(b)(4) of the Act.[6] Although the Board ruled that article XIII violated § 8(e) of the Act, it reasoned that reimbursement is inappropriate in the absence of a § 8(b)(4) violation.

We reject the Board's reasoning that the purposes of the Act are effectuated by reimbursement for violations of § 8(b)(4), but not for violations of § 8(e).[7] To be sure, reimbursement is inappropriate in the absence of coercion. *See Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 655-56, 81 S.Ct. 875, 877-78, 6 L.Ed.

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losses directly attributable to actual coercion by Respondent Unions, nor has the remedial issue been expressly litigated. Furthermore, we find a reimbursement order, typically used to "make whole" employees for violations of the Act, to be generally overly broad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators requested by CDTOA would not effectuate the remedial policies of the Act. *See Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. v. N.L.R.B.*, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961)," 248 NLRB at 817 n. 34.

[6] 29 U.S.C. § 158(b)(4) (1976).

[7] The NLRB claims that the Board has "consistently" declined to grant make-whole remedies in cases involving only violations of § 8(e). For support, the NLRB relies on *Newspaper and Periodical Drivers and Helpers Union v. N.L.R.B.*, 509 F.2d 99 (9th Cir. 1974), *cert. denied*, 423 U.S. 831, 96 S.Ct. 51, 46 L.Ed.2d 48 (1975). In that case, however, the court merely held that the Board did not abuse its discretion in denying back pay to independent contractors terminated in violation of § 8(e). Moreover, the Board's own decision in *Newspaper Drivers* offers no explanation for denying a make-whole remedy. *See Newspaper and Periodical Drivers and Helpers Union Local 921*, 204 NLRB 440, 448 (1973). Thus, neither the Board's decision, nor the Ninth Circuit's brief affirmance, provides support for a *per se* rule denying reimbursement in § 8(e) cases.

2d 1 (1961).[8] But when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation. Article XIII presented the truck owners with the grim choice of joining the union or foregoing work with the signatory employers. Although the unions may not have employed coercive tactics, violative of § 8(b)(4), the inclusion of article XIII in the collective bargaining agreement would necessarily have had the effect of coercing otherwise reluctant truck owners to join the union.[9] *See Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1357 (9th Cir. 1970).

We are unable to distinguish this case from two cases in which the Board ordered restitution to parties who

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[8] In *Local 60*, the Board had ordered reimbursement of union fees and dues paid while an illegal closed-shop preferential hiring agreement remained in effect. The Court refused to enforce the Board's order because it found no evidence that union membership had been coerced. The Court emphasized that persons affected by the order were already union members when employed on the job in question, and that no one had joined the union specifically to obtain work on that job. 365 U.S. at 654, 81 S.Ct. at 877. Thus, *Local 60* is readily distinguishable from the case before us.

[9] The Board stated that "no evidence has been introduced with respect to alleged losses directly attributable to *actual* coercion by Respondent Unions," 248 NLRB at 817 n.34 (emphasis added). We read the Board's statement as merely a finding that the unions did not directly confront truck owners and force them to join the union. Admittedly, the statement might be interpreted as an evidentiary ruling that the truck owners offered no proof that individuals had joined the union as a result of article XIII, as was the case in *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961). We doubt, however, that the Board intended that meaning, since the record shows that at every available juncture the truck owners fought the unions' attempt at unionization. *See Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977).

joined unions pursuant to illegal collective bargaining agreements.[10] *See Sheraton-Kauai Corp.*, 177 NLRB 25 (1969), *enforced*, 429 F.2d 1352, 1357-58 (9th Cir. 1970); *Local 814, Teamsters (Santini Brothers)*, 208 NLRB 134 (1974), *enforced*, 546 F.2d 989 (D.C.Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

In *Santini Brothers*, by staging a walkout, the union coerced the employer to accept a restrictive collective bargaining agreement; enforcement of that agreement, in turn, coerced independent truckers to join the union. The Board found violations of both § 8(b)(4) and § 8(e), and ordered reimbursement to the independent truckers.

We are not persuaded that the § 8(b)(4) violation in *Santini Brothers* justifies granting restitution in that case, while denying it here. The Board would have restitution turn on the union's use of a coercive tactic, violative of § 8(b)(4), to persuade the employer to accept a restrictive provision. The relevant inquiry, however, is whether the truck owners, irrespective of any coercion of the employer, were coerced into union membership by an unfair labor practice.

The Board implicitly recognized this principle in *Sheraton-Kauai*. In that case, the employer and union illegally extended a union security clause in a collective bargaining agreement to employees of a new hotel, thus denying the employees an opportunity to resolve the question of union representation for themselves. The union did not coerce the employer in violation of § 8(b)(4); nor did the union directly coerce the employees. Nonetheless, the Board

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[10] The Board cannot arbitrarily impose different remedies in similar situations. *See Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966) ("nor can [the Board] treat similar situations in dissimilar ways").

ordered restitution after finding that, by "submitting [the employees] to the terms and conditions of the . . . agreement," the union effectively coerced the employees into union membership. 177 NLRB at 29.

Reimbursement in this case, as in *Sheraton-Kauai* and *Santini Brothers,* would effectuate the policies of the Act by returning to the truck owners money paid to support a union they did not freely choose to join, and by depriving the unions of the benefit of their unfair labor practice. *See Virginia Electric and Power Company v. N.L.R.B.,* 319 U.S. 533, 541, 63 S.Ct. 1214, 1219, 87 L.Ed. 1568 (1943); *Graphic Arts International Union Local 280 v. N.L.R.B.,* 596 F.2d 904, 910 (9th Cir. 1979).[11]

B.

We find unpersuasive the other reasons offered by the Board for denying reimbursement.

First, we are confused by the Board's contention that the remedial issue was not expressly litigated. The truck owners raised the remedy issue in their brief to the Board as charging party. To the extent that factual issues remain—such as the amount of damages—they can be resolved in an NLRB proceeding. *See N.L.R.B. v. Local 776, Film Editors,* 303 F.2d 513, 521 (9th Cir.), *cert. denied,* 371 U.S. 826, 83 S.Ct. 47, 9 L.Ed.2d 65 (1962).

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[11] Counsel for the NLRB suggested that reimbursement would result in unjust windfalls to the truck owners who may have benefitted from becoming signatories to the union. To the extent that the truck owners received actual benefits in return for their fees and dues, the value of these benefits may be deducted from the amount of reimbursable damages. We see no reason, however, to show that they paid fees that did not lead to benefits. The issue whether fees and dues created comparable benefits remains to be litigated.

Next, the Board said that the truck owners had an alternative remedy under § 303. It would be wasteful and unfair to force the truck owners, who have opposed unionization in legal proceedings for ten years, *see Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977), to renew the battle in a § 303 proceeding. Moreover, we see no reason to burden a federal district court with § 303 litigation, when reimbursement can be ordered in an NLRB proceeding. *Cf. Sheraton-Kauai Corporation v. N.L.R.B.*, 177 NLRB 25 (1969) (by implication) (ordering reimbursement where a § 303 remedy might have been available), *enforced*, 429 F.2d 1352 (9th Cir. 1970); *Local 814, Teamsters (Santini Brothers)*, 208 NLRB 184 (1974) (same), *enforced*, 546 F.2d 989 (D.C.Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

Finally, the Board noted that reimbursement orders typically used to "make whole" employees. We note, however, that the Board has also ordered reimbursement for employers and independent contractors when to do so would effectuate the policies of the Act. *See, e.g., Graphic Arts International Union Local 280*, 235 NLRB 1084, 1085 (1978), *enforced*, 596 F.2d 904 (9th Cir. 1979) (employer); *Local 814, Teamsters (Santini Brothers)*, 208 NLRB 184 (1974), *enforced*, 546 F.2d 989 (D.C.Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977) (independent contractors).

For these reasons we remand to the Board to fashion a make-whole remedy[12] or to show good cause why a make-whole remedy would not effectuate the purposes of the Act. *See Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F.2d 848, 852 (9th Cir. 1975).

Order ENFORCED IN PART and REMANDED for consideration consistent with this opinion.

Joint Appendix

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No. 81-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SHEPARD, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

BUILDING MATERIAL and DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al.,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, *Intervenors.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOINT APPENDIX

(Names of Counsel on inside front cover)

Petition For Certiorari Filed March 3, 1982
Certiorari Granted May 17, 1982

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The following opinion and order have been omitted in the printing of this appendix because they appear in the appendix to the Petition for Writ of Certiorari:

—Opinion, U.S. Court of Appeals for the District of Columbia Circuit entered December 4, 1981 [669 F.2d 759 (D.C. Cir. 1981)]

—Decision and Order of the National Labor Relations Board issued May 8, 1980 [249 N.L.R.B. 386 (1980)]

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	*Relevant Entry*
12-19-1977	Intervenor California Dump Truck Owners Association files § 8(e) unfair labor practice charge, Case No. 21-CE-197
9-25-1978*	Petitioner Larry Shepard files § 8(b)(4) unfair labor practice charge, Case No. 21-CC-2111
10-20-1978	Petitioner withdraws § 8(b)(4) charge and files § 8(e) unfair labor practice charge, Case No. 21-CE-220
1-24-1979	National Labor Relations Board petitions federal District Court to enjoin enforcement of the "hot cargo" provisions of the Master Labor Agreement, Case No. 79-86, U.S. District Court for the Southern District of California
1-29-1979	NLRB issues order consolidating cases, consolidated Complaint, and Notice of Hearing
2- 9-1979	Intervenor Teamsters Local 36 files its Answer to the Consolidated Complaint
3- 2-1979	Hearing on Temporary Injunction in the federal District Court
3-15-1979	Federal District Court grants the NLRB a Temporary Injunction
7- 5-1979	NLRB Order rescheduling Hearing
8-27-1979	Hearing before an Administrative Law Judge of the NLRB
10-30-1979	Decision and Recommended Order of the Administrative Law Judge

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* Because this charge was subsequently withdrawn, it was NOT a part of the official record below, but was included as an appendix to Petitioner's Reply Brief to the Circuit Court of Appeals.

Date	*Relevant Entry*
11-23-1979	Intervenor Teamsters Local 36 files exceptions to the Decision of the Administrative Law Judge
11-29-1979	Intervening Contractors Associations file exceptions to the Decision of the Administrative Law Judge
5- 8-1980	Decision and Order of the NLRB
5- 8-1980	Intervenor Teamsters Local 36 petitions for review in the Court of Appeals for the District of Columbia Circuit, Case No. 80-1503
5-12-1980	Intervenor California Dump Truck Owners Association petitions for review in the Court of Appeals for the Ninth Circuit, Case No. 80-7246
5-16-1980	Petitioner Larry Shepard petitions for review in the Court of Appeals for the Ninth Circuit, Case No. 80-7261
—	[All parties intervene/cross-intervene]
6-18-1980	NLRB cross-petitions for enforcement of its Order
7- 1-1980	Ninth Circuit transfers its petitions to the District of Columbia Circuit for venue hearing
7-24-1980	District of Columbia Circuit consolidates cases
8- 2-1980	District of Columbia Circuit denies motions to re-transfer cases to Ninth Circuit
—	[All parties file briefs]
5- 7-1981	Oral arguments on the merits before the District of Columbia Circuit
12- 4-1981	Opinion of the District of Columbia Circuit

Date	*Relevant Entry*
12- 4-1981	Per Curiam Order denying petitions and enforcing the Order of the NLRB
2- 2-1982	Judgment for the NLRB
3- 3-1982	Petitioner Larry Shepard files petition for writ of certiorari with Supreme Court
5-17-1982	Petition for writ of certiorari granted

SHORT FORM AGREEMENT BETWEEN TERRA TRUCKING COMPANY AND TEAMSTERS LOCAL 36, DATED MAY 14, 1974 [GENERAL COUNSEL EXHIBIT NO. 7]

[Agency Record, pp. 156-157, admitted into evidence, Agency Transcript, p. 97]

THIS AGREEMENT is entered into this 14th day of May, 1974, by and between Terra Trucking Co., hereinafter referred to as the "EMPLOYER", and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 36, hereinafter referred to as the "UNION."

Article I

The EMPLOYER hereby recognizes the UNION as the sole and exclusive collective bargaining representative of all the employees of the EMPLOYER performing work over which the UNION has work and area jurisdiction pursuant to the Master Labor Agreement for San Diego County (hereinafter "Master Labor Agreement") covering construction work and especially Article II(A) thereof.

Article II

A) The EMPLOYER, not being signatory to any Teamsters Collective Bargaining Agreement governing the wages, hours and working conditions of the employees of the EMPLOYER performing work covered by this Agreement, hereby agrees to accept and be bound by all of the terms and conditions of the Master Labor Agreement applicable to the EMPLOYER'S operations within the jurisdiction of the UNION and in effect in the area in which the work is performed, as recognized, modified and renewed from time to time through collective bargaining between the UNION and the Associated General Contractors of America, San Diego Chapter, Inc., San Diego Build-

ing Contractors Association, and Engineering and Grading Contractors Association, Inc., San Diego Chapter. The EMPLOYER approves of, consents to, ratifies and agrees to be bound by all clauses of the from time to time current Master Labor Agreement existing between the UNION and the appropriate EMPLOYER Associations, and further including any amendments, modifications, extensions, changes, supplements and renewals of said agreement negotiated by the parties thereto. Provided, however, that excluded from this Agreement are any provisions of the Master Labor Agreement which are in conflict with this Agreement. Whenever such conflict exists, as determined by the UNION, the provisions of this Agreement shall apply. Such Master Labor Agreement is hereby adopted in its entirety subject to the foregoing exception and subject to Article III of this Agreement.

B) The EMPLOYER, party hereto, agrees that he shall contract or subcontract all job-site work as described in Article I above only to a person, firm, partnership or corporation that is party to an executed, current Agreement with the appropriate UNION having work and territorial jurisdiction over the work performed. A subcontractor is defined as any person, firm, partnership or corporation that agrees, under contract with the EMPLOYER or his subcontractor, to perform any part or portion of the work covered by this Agreement, including the operation of equipment, performance of labor, and the furnishings, installation or removal of materials.

Article III

A) To the extent that any provisions in the Master Labor Agreement adopted herein by reference contain references to or provisions for grievance procedures or arbitration (other than jurisdictional disputes under the National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry), or

commitments not to strike over grievances or claims of contract violation, the same shall not be in effect nor binding on the parties to this Agreement. In the place of such provisions, the parties mutually agree to meet and attempt to settle all such grievances and claims of contract violation by direct negotiation between duly authorized representatives of each of the parties.

B) If the parties are unable to settle or adjust any such grievance or claim of contract violation, nothing contained in this Agreement, expressly or by implication, shall in any way limit or modify the right of each party to enforce this Agreement or adjust grievances by means of legal or economic action; Provided, that the UNION, at its option, may agree to arbitration of any such disputes by an arbitrator selected from a list of five names provided by the Federal Mediation and Conciliation Service. If the UNION exercises its option to request arbitration, the EMPLOYER consents to arbitrate the dispute on the basis that there shall be no economic action taken by either party with regard to the dispute pending the outcome of the arbitration. Within five (5) days after the list is received from the Federal Mediation and Conciliation Service, the parties shall select an arbitrator from the list by using the traditional strike-off procedure. The party to strike first shall be determined by lot. The parties shall then alternate striking one name each until only one name remains on the list. This last name shall be the arbitrator. The dispute shall be submitted forthwith to the arbitrator thus selected and his decision shall be final and binding on the parties. Costs of arbitration shall be evenly divided between the parties.

Article IV

It is agreed that no employee working under this Agreement need work under any conditions which may be, or tend to be detrimental to his health, morals or reputation.

The EMPLOYER agrees that he shall not discriminate against any employee who refuses to enter any premises subject to picketing, or to cross any lawful primary picket line, including any picket line authorized or sanctioned by any Building and Construction Trades Council, Central Labor Council or Teamsters Joint Council.

Article V

This Agreement shall become effective as of the date shown above and shall continue in effect to the same term as the Master Labor Agreement for San Diego County and for any renewals or extensions thereof, unless either party shall give written notice to the other party at least sixty (60) days prior to the termination date of said Master Labor Agreement for San Diego County, of its desire to terminate, in accord with the provisions of Section 8(d) of the Labor Management Relations Act, as amended.

EMPLOYER
TEBRA TRUCKING CO.
/s/ Fred ReCupido

TEAMSTERS LOCAL UNION NO. 36
/s/ John S. Lyons
Secretary-Treasurer
Teamsters Union Local No. 36
Building Material and Dump Truck Drivers

EXCERPTS FROM MASTER LABOR AGREEMENT FOR SAN DIEGO COUNTY COVERING CONSTRUCTION WORK BY CARPENTERS; CEMENT MASON LOCAL #744; LABORERS LOCAL #89; TEAMSTERS LOCAL #36; PIPEFITTERS LOCAL #230; AND OPERATING ENGINEERS FOR ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC.; SAN DIEGO BUILDING CONTRACTORS ASSOCIATION; AND ENGINEERING AND GENERAL CONTRACTORS ASSOCIATION. [GENERAL COUNSEL'S EXHIBIT NO. 9]

[Agency Record, pp. 162-317, admitted into evidence, Agency Transcript, p. 184]

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Section 2

TERM-TERMINATION AND RENEWAL

A. This Agreement shall become effective on June 16, 1977, and as amended shall remain in full force and effect through June 15, 1980, and from year to year thereafter, unless either party has given sixty (60) days written notice to other party prior to the anniversary date of their intention to amend, modify or terminate. Negotiations for a succeeding Agreement shall begin not later than April 15, of the appropriate anniversary year and continue until Agreement is reached or either party terminates.

• • • • •

Section 4

WORK COVERED

Work covered by this Agreement shall include all jobsite work performed by the EMPLOYER or its sub-contractor for the construction, in whole or in part, or the improvement or modification thereof, any building structure or other work and operations which are incidental thereto, and the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities used in connection with the performance of the aforementioned

jobsite work and services, and shall include without limitation the following types of classes of work:

• • • • •

4. So far as it is within the control of the EMPLOYER or his subcontractor, all materials, supplies and equipment used on the job shall be transported to or from or on the site of the work by workmen furnished by the appropriate craft UNION signatory hereto. Nothing herein contained shall be construed to prohibit the normal delivery of freight by common carrier.

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Section 12

UNION SECURITY

1. Every person performing work covered by this Agreement who is a member of the Union and in the employment of an individual Employer on work covered by this Agreement on the effective date of this Section shall, as a condition of employment or continued employment, remain a member in good standing of the Union in the appropriate local Union of the Unions signatory hereto. Every other person covered by this Agreement and employed to perform work covered by this Agreement shall be required as a condition of employment, to apply for and become a member of and to maintain membership in good standing in the appropriate local Union of the Unions which have territorial jurisdiction of the area in which such person is performing work on or after the 7th day of employment, continuous or cumulative, on such work following the beginning of such employment or the effective date of this Section, whichever is later. Membership in any local Union shall be available to any such person on the same terms and conditions generally applicable to other members. If Federal law is hereafter amended to permit a lesser requirement for Union membership or Union membership as a condition of employment other than provided in this Section, the Employer and the Union will promptly enter into negotiations with regard to such subject.

2. The individual Employer shall not be required to discharge any employee pursuant to this Section until a written notice from the Union of such employee's non-compliance with this Section, stating all pertinent facts showing such noncompliance, shall have been served upon such individual Employer.

3. For the purpose of determining membership in good standing it is agreed that this shall be interpreted to mean that the worker has tendered the periodic dues and the initiation fees uniformly required as a condition for acquiring or retaining UNION membership. Workers who do not comply with the provisions of this Section shall immediately be discharged by the EMPLOYER upon the request of the UNION.

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Section 42

TEAMSTER WORKING RULES

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B. Owner-Operator:

1. The EMPLOYER may obtain trucks or equipment from any source, however, the operators on such trucks or equipment will be properly cleared before starting to work on the second day. The Owner-Operators of such trucks or equipment must furnish proof of legal or registered ownership. In order for the Owner-Operator to be properly cleared, he must present himself and proof of legal or registered ownership at the UNION'S office, and once properly cleared, such clearance is valid in San Diego County until there is a change in the Owner-Operator's equipment status.

2. The EMPLOYER may procure Owner-Operators from a person, firm, corporation or other business entity which is signatory to an agreement with the Union, and who are making proper fringe benefit payments. Such person, firm, corporation or other business entity will be considered for the purposes of this Agreement to be a subcontractor.

Should any portion of the Owner-Operator language contained in this Agreement be ruled null and void or unenforcable [sic] by a court of competent jurisdiction or the NLRB, said ruling effecting that section of the Owner-Operator language shall immediately be deemed to be incorporated into this Agreement until the provision of Section 10 (General Saving Clause) are invoked.

3. The Contractor expressly reserves the right to control the manner, time, means and details of, and by which the Owner-Operator performs his services, as well as the ends to be accomplished, and shall be the sole judge of the capability of the Owner-Operator's equipment to perform the work required to be performed and may, if the Contractor determines that the Owner-Operator equipment is not capable of performing the work required to be performed, terminate such Owner-Operator's services. Failure to work the day or one-half (½) day out, as directed, shall terminate the Owner-Operator's employment, and he shall be paid only for actual time worked prior to such failure. The Contractor shall not pay for time spent by the Owner-Operator in repairing, servicing, or maintaining his equipment after termination of employment or before or after his shift or half-shift, as the case may be.

4. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him, except as provided elsewhere in the Section and except that in the event that it is determined that the services of an Owner-Operator were terminated, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that the Owner-Operator shall not be subject to the provisions of paragraphs 1, 2, 3, 4, 4(a), 4(b), 4(c) of Section 26 of this Agreement.

• • • • •

9. It is further mutually understood and agreed that the intent of this Section is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement.

• • • • •

11. Notwithstanding any other provision of this Agreement, this Section 42 shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done under Section 4.

12. If the EMPLOYER through a three man committee, selected in accordance with the procedure described in the Stewards Clause contained in Section 14, is found violating any portion of this section, the EMPLOYER shall immediately pay for each Owner-Operator with respect to whom the EMPLOYER is in violation, a sum equal to one day's pay at the highest hourly rate covering wage and fringe benefit costs under this Agreement for each day or portion thereof the violation occurred, such money to be made payable to the Lukemia [sic] Society, San Diego Chapter, by check and promptly mailed to Teamsters Local No. 36.

13. When a truck or piece of equipment is driven or operated by its owner and is used on work covered by this Agreement, the Owner-Driver or operator of said truck, or piece of equipment, shall receive a rate of pay not less than that specified in this Agreement and shall be subject to the terms and conditions of this Agreement.

• • • • •

Q. Classifications, Wages and Fringe Benefits:

	6/16/77	7/1/77	9/1/77	7/1/78	1/1/79	7/1/79
Health and Welfare	$ .90	$. 90	$1.05	$1.05	$1.05	—•
Pension	$ .85	$ .95	$ .95	$1.00	$1.30	$1.37
Vacation	$1.00	$1.00	$1.00	$1.00	$1.00	$1.00
C.I.A.F.	$ .05	$ .05		$ .05	$ .05	$ .05
Training and Retraining	$ .10	$ .10	$ .10	$ .10	$ .10	$ .10
Supplemental Dues	$ .05	$ .05	$ .05	$ .05	$ .05	$ .05

GROUP CLASSIFICATION WAGE:

	6/16/77	6/16/78	12/16/78	6/16/79	12/16/79
Group I					
2 Axle Dump Trucks	$ 8.85	$ 9.15	$ 9.40	$.44	$ .40
• • • • •					
Group II					
3 Axle Dump Truck	$ 9.05		$ 9.35	$ 9.60	
3 Axle Flat Bed					
• • • • •					
Group III					
Off-Road Dump Trucks					
under 35 tons MFG	$ 9.25		$ 9.55	$ 9.80	
• • • • •					
Group IV					
Off-Road Dump Trucks					
35 tons & over MFG					
Rated Capacity	$ 9.45		$ 9.75	$10.00	
• • • • •					

S. Vacation-Holiday Fund:

The EMPLOYER agrees to continue to pay the sum of one dollar ($1.00) per hour into the San Diego Construction Teamsters Vacation-Holiday Fund for each hour worked by or paid to employees in all Teamsters classifications. The EMPLOYER hereby accepts, ratifies and becomes bound by the terms of that certain Agreement and Declaration of Trust executed November 8, 1963, as amended, and as it shall be amended, the same as though he were signatory thereto.

T. Health and Welfare:

Effective June 16, 1977, the EMPLOYER agrees to pay into the Teamsters Health and Welfare Trust of San Diego County ninety cents (90¢) per hour for each hour worked or paid to employees in all Teamster classifications. Effective September 1, 1977, the contribution shall be one dollar

five cents ($1.05) per hour. The EMPLOYER further accepts all of the terms and conditions of said Trust as amended, and agrees to be bound thereto in every way, including the obligation to make the required periodic contributions and payments.

U. Pension Plans:

1. The Employer agrees to continue to pay into the Western Conference of Teamsters Pension Trust Fund sixty-five cents (65¢) per hour for each hour worked or paid to employees in all Teamster classifications; effective July 1, 1977, the contribution rate will be seventy cents (70¢) per hour; and effective July 1, 1978, the contribution rate will be seventy-five cents (75¢) per hour.

In accordance with the Western Conference of Teamster Pension Trust Fund Joint Trustees determination that additional contributions are necessary so as not to reduce retirement benefits because of the requirements of the Employees Retirement Income Security Act of 1974, for employees who retire (other than for disability), the Employer agrees, effective January 1, 1979, to increase the contribution rate from seventy-five cents (75¢) per hour to one dollar and five cents ($1.05) per hour.

Effective July 1, 1979, the contribution rate will be increased to one dollar and twelve cents ($1.12) per hour.

The parties agree that, because the Trustees of the Fund will rely on the execution of this agreement to not reduce benefits to retiring employees as indicated above, this section shall not be modified, terminated or rescinded by the parties, directly or indirectly, without the express written consent of the Trustees.

The Employer and the Union agree to execute the necessary Trust documents required by the Trustees of the Western Conference of Teamsters Pension Trust as a condition of participation in such trust. The Employer hereby accepts, ratifies and becomes bound by the terms of that

certain Agreement and Declaration of Trust executed April 26, 1955, as amended, as it shall be amended, the same as though he were signatory thereto.

It is understood that the Employer's obligations under the Western Conference of Teamsters Pension Trust provisions of this Agreement are satisfied by the payment of the contributions as described above.

2. The Employer agrees to pay into the San Diego County Construction Supplemental Pension Trust through Allied Administrators, Inc., the amount of twenty cents (20¢) per hour for each hour worked by or paid to employees in all Teamster classifications. Effective July 1, 1977, the contribution shall be twenty-five cents (25¢) per hour.

The Employer hereby accepts, ratifies and becomes bound by the terms of that certain Agreement and Declaration of Trust, as amended, and as it shall be amended, the same as though he were signatory hereto.

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X. Supplemental Working Dues:

The EMPLOYER shall pay five cents (5¢) per hour for each hour worked or paid to each Teamster employee into a Supplemental Dues Fund.

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Y. Training and Retraining Program:

Effective June 16, 1977, the Employer agrees to pay into the San Diego County Construction Teamsters Training and Retraining Trust Fund ten cents (10¢) per hour for each hour worked or paid to employees in all Teamster classifications.

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Section 45

Fringe Benefits

A. The parties agree that the Benefit Trust funds contained herein were created and operated solely as defined Contributions Trust Funds as permitted by the federal Taft-Hartley law. These various funds are jointly administered by equal numbers of Employer Trustees and equal numbers of Union Trustees. The craft Unions signatory to this Agreement will be represented only on their respective craft trust funds, whereas, the Employer Associations will be represented on all Trust Funds established pursuant to this Agreement.

B. Reporting and Payment of Contributions: All Employers, whether or not acting in the capacity of General Contractor or subcontractor, who are required by either this Agreement or a separate Union Agreement, to make fringe benefit payments to the Trust Funds specified in this Agreement, shall submit all reports and make all payments when due.

C. All Employer reports, and contribution payments, shall be filed with the Trust Funds' custodian bank on or before the 10th day of the calendar month following the month in which the contributions accrued. If the bank does not receive the report and remittance by the 15th day of the month, the employer shall be deemed delinquent.

D. Contributions to the Trust Funds are due and payable for all employees performing work as described in Section 4 of this Agreement.

E. Contributions shall be paid for all compensatory hours. As an example on a two or three shift operation where the employee works seven and one half (7½) hours and is paid for eight (8) hours, contributions shall be paid on eight (8) hours. Another example, where an employee works four (4) hours overtime and is paid at the overtime rate, contributions shall be paid for four (4) hours.

UNFAIR LABOR PRACTICE CHARGE, FILED DECEMBER 19, 1977, BY INTERVENOR CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION

[Supplemental Agency Record, p. 1]

NATIONAL LABOR RELATIONS BOARD

CHARGE ALLEGING UNFAIR LABOR PRACTICE UNDER SECTION 8(e) OF THE ACT

INSTRUCTIONS: File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practices occurred or is occurring.

Case No. 21-CP-192
Date Filed 12-19-77

1. CHARGE FILED AGAINST: Employer and Labor Organization [X] Employer [ ] Labor Organization [ ]

a. Name of Labor Organization (Give full name, including local name and number): Teamsters Local Union #36
b. Union Representative to Contact: John S. Lyons
c. Phone No.: 299-3550

d. Address (Street and number, city, State and ZIP code): 2001 Camino del Rio South, San Diego, Calif. 92108

e. Name of Employer: See Attached List
f. Employer Representative to Contact: See Attached List
g. Phone No.:

h. Location of Plant Involved (Street, city, State and ZIP code): San Diego County Dump-Truck-For-Hire Industry

i. Type of Establishment (Factory, mine, wholesaler, etc.): Not Applicable
j. Identify Principal Product or Service: Dump-Truck-For-Hire Industry
k. No. of Workers Employed: ca. 1500.

The above-named labor organization or its agents, and/or employer has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(e) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, places involved, dates, places, etc.)

On or after June 16, 1977, the above-named labor organization and employers entered into the "Master Labor Agreement for San Diego County" ("MLA"). Sections 32 and 42 of the MLA as modified by Sections 4 and 12 constitute unlawful hot cargo clauses in violation of Section 8(e) of the National Labor Relations Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number): California Dump Truck Owners Association

4a. Address (Street and number, city, State and ZIP code): 301 East Pomona Boulevard, P. O. Box 215, Monterey Park, California 91754
4b. Telephone No.: 685-4157

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization):

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: George H. Wu (Signature of representative or person filing charge) — Attorneys for California Dump Truck Owners Association (Title, if any)

Address: LATHAM & WATKINS, 555 So. Flower St., Los Angeles — 485-1234 (Telephone number) — December 16, 1977 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

D.C. Exhibit 1(a)

SUB-HAULING CONTRACT BETWEEN TERRA TRUCKING COMPANY AND LARRY W. SHEPARD DATED FEBRUARY 3, 1978 [GENERAL COUNSEL EXHIBIT NO. 3]

[Agency Record, pp. 149-151, admitted into evidence, Agency Transcript, p. 16]

SUB-HAULING CONTRACT

Recitals

Terra Equipment Company (hereinafter referred to as Principal Carrier) desires to procure transportation of certain property and materials consisting of rock, sand, gravel, readymixed concrete, earth, asphaltic concrete, and other similar materials; and the undersigned trucking operator (hereinafter called sub-hauler) is willing, as an independent contractor and not as an employee of principal carrier, to furnish said transportation.

Agreement

Now Therefore, in consideration of the mutual promises herein contained, principal carrier and the sub-hauler agree as follows:

1. The sub-hauler represents and warrants that he is engaged in the trucking business as a for-hire carrier and owns 1 trucks used in connection with such business.

2. The sub-hauler further represents and warrants that he is the holder of all of the necessary State and/or Federal certificates, permits or licenses which are required or necessary for him to conduct his business as a hauling contractor; and that he has registered as required by law with the appropriate Collector of Internal Revenue authorizing him to operate under the Federal Transportation Excise Tax Law.

3. The sub-hauler further represents that he is fully protected by workmen's compensation, public liability and property damage insurance, and will continue to be so protected during the term of this agreement, and does undertake and agree to hold and protect principal carrier free and harmless from and against any and all liability loss, cost, damage or expense including reasonable attorney fees by reason of anything done by sub-hauler or suffered by principal carrier hereunder.

4. Principal carrier shall notify the sub-hauler of the property to be transported and of the time and location of the place to load same, and of the place of delivery, all within a reasonable time prior to the date that delivery is required; that thereafter the sub-hauler shall with all reasonable diligence, cause such materials and property to be transported to the place indicated.

5. Principal carrier shall have no control over the truck drivers or any other persons used or employed by the sub-hauler, nor shall principal carrier have any control over the route, method of hauling or transportation, or the detail of management thereof. The sub-hauler shall cause such materials and property to be expeditiously and safely transported and in doing so shall at his own cost and expense furnish all necessary labor, equipment, gasoline and oil, repairs and other supplies necessary to that end, and shall have full charge, control, and responsibility over the manner and method employed and shall pay all taxes levied in connection with such operations unless principal carrier is required by law to pay such taxes direct to governmental agencies, in which case such taxes shall be deduced [sic] from principal carrier's payment to the sub-hauler.

6. Principal carrier shall pay the sub-hauler for the performance of hauling service, 95% of the minimum rates established for such service by the California Public Utili-

ties Commission, unless some other legal rate is agreed by the parties and is appended to this contract.

7. Principal carrier shall pay the sub-hauler amounts accrued in conformity with paragraph 6 hereof on the 20th day of each month for all hauling done in the previous calendar month for which signed shipping documents have been submitted to principal carrier by the 3rd of said month.

8. This contract shall commence 3/3/78 and terminate upon 24 hours due notice by either party thereof to the other, or may be terminated by either party on one day's notice in the event of a breach hereof by the other. Unless sooner terminated as in this paragraph provided, this contract shall terminates at the end of ————. By agreement, in writing to the parties hereto, this contract may be extended from time to time as in said writing provided.

9. It Is Understood and Agreed by and between the parties hereto, each for himself or itself, and any and all employees of either; as a condition absolute and precedent to the making of this contract:

(a) That in relation to the principal carrier the sub-hauler herein shall stand solely in the capacity of an independent contractor;

(b) That the said principal carrier shall exercise no direction or control over any of the employees of the sub-hauler or the manner in which any of the work or services hereunder to be furnished shall be performed; and

(c) That under no circumstances shall sub-hauler permit any of the employees of said sub-hauler to be construed to be, or represent themselves to be, or have, or exercise any rights or claims as employees of said principal carrier, and sub-hauler shall not represent himself as employee of principal carrier to any third party or person.

10. The sub-hauler further represents and warrants that during the term of this contract he will comply with all laws, regulations, and orders now effective, or which shall hereafter become effective, which govern his activities under this contract as an independent contractor.

11. This contract, or any term, or provision hereof shall not be superseded, altered, suspended or varied without the written consent of [sic] principal carrier, the parties hereto, and such written consent must be by the individuals or corporate officers authorized to effect such agreement.

12. Sub-hauler further authorizes the following deductions from earnings due from principal carrier if so advanced by principal carrier for the benefit of or made for the benefit of sub-hauler: Fuel, tires, repairs, parts, payroll and payroll costs, payroll benefits as required by the Union Agreement applicable during the life of this agreement; premium deduction of any and all kind deemed necessary by principal; workman's compensation deduction; advances made to or for the benefit of sub-hauler, together with any trailer deduction for rented trailer, together with a 5% charge for any and all charges so made.

No 5% fee or charge on advances

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed this 3rd day of Feb., 1978.

Terra Equipment Company

/s/ Grace ReCupido
Principal Carrier

/s/ Larry Shepard
Sub-Hauler

Fidelity and Deposit
Company of Maryland
Bond #9124172

TRAILER RENTAL AGREEMENT BETWEEN TERRA TRUCKING COMPANY AND LARRY W. SHEPARD DATED FEBRUARY 3, 1978 [GENERAL COUNSEL EXHIBIT NO. 4]

[Agency Record, p. 152, admitted into evidence, Agency Transcript, p. 45]

Truck & Trailer No. ——

TRAILER RENTAL AGREEMENT

This AGREEMENT, entered into this 3rd day of Feb., 1978, between Terra Trucking Company, Party of the 1st Part, and Larry Shepard, Party of the 2nd Part, whose PUC Permit No. is Cal T-

The Party of the 1st Part agrees to rent trailers to the Party of the 2nd Part at the rate of 20% of revenue paid by the overlying carrier. The Party of the 2nd Part agrees to accept hauling assignments only from the Party of the 1st Part and from no other without prior written approval and consent of the Party of the 1st Part. When the Party of the 2nd Part hauls for the Party of the 1st Part, the rates paid to the Party of the 2nd Part shall be no less than minimum rates set forth in Tariff 7-7A and in Tariff 17A.

The Party of the 2nd Part agrees to keep trailers of the Party of the 1st Part lubricated, to furnish the labor to make minor repairs on them, to keep the brakes adjusted, to keep the tires properly aired.

The Party of the 2nd Part agrees to assume and be responsible for all moving traffic violations he may receive in the operation of the said trailers and equipment.

It is agreed that the Party of the 1st Part will insure the trailers rented by the Party of the 2nd Part for all physical damages on a $250.00 deductible policy, and the Party of the 2nd Part agrees that in case said loss he will

reimburse the Party of the 1st Part for his loss of $250.00 incurred through the insurance contract.

This agreement may be terminated by the Party of the 2nd Part by giving the Party of the 1st Part 5 days notice. In the event that the Party of the 2nd Part fails to give notice of termination as herein provided, the Party of the 2nd Part recognizes that it would be extremely difficult, if not impossible, to fix the actual expense and damage to the Party of the 1st Part which would result from such termination without notice. Therefore, in the event of such termination, the amount of damage to the Party of the 1st Part shall be presumed to be the sum of $250.00 which shall become due and payable to the Party of the 1st Part as liquidated damages and not as a penalty, upon the date of termination, and may be deducted by the Party of the 1st Part from any sums then owing by the Party of the 1st Part to the Party of the 2nd Part. This agreement may be terminated by the Party of the 1st Part by giving the Party of the 2nd Part 5 days written notice.

Trailers rented under this agreement, when not assigned to a job, will be parked in the place designated by the Party of the 1st Part. When "Out of Town" contracts or jobs are completed, or when this contract is terminated, the Party of the 2nd Part shall return the trailers to the company's home yard unless otherwise directed by the Party of the 1st Part. The cost of the return of the trailers to the above mentioned place, even if performed by others, shall be borne by the Party of the 2nd Part.

The physical operation of the trailers and power unit operated by the Party of the 2nd Part shall be done to the satisfaction of those with whom the Party of the 1st Part has contracts.

If the Party of the 2nd Part violates any of the above conditions, the Party of the 1st Part may declare this rental agreement terminated.

This Agreement supersedes any rental agreement that may have been in effect prior to the above date.

/s/ Fred ReCupido, Jr.
Party of the First Part

/s/ Larry W. Shepard
Party of the Second Part

TERRA TRUCKING COMPANY MONTHLY REPORT FOR APRIL 1978 TO THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND [UNION'S EXHIBIT #1]

[Agency Record, p. 318, admitted into evidence, Agency Transcript, p. 105]

THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND
SOUTHWEST AREA

1. IMPORTANT: Refer to instructions on back of form for Hires and Terminations. Include Social Security numbers for all employees.
2. Make check payable to: The Western Conference of Teamsters Pension Trust Fund
3. Mail check with Original and first 2 carbons to: Western Conference of Teamsters Pension Trust P.O. Box 3895 Terminal Annex Los Angeles, California 90051

1616 West 9th Street
Los Angeles, California
213
(213) 386-3300

EMPLOYER'S MONTHLY REPORT

Total contributions due for month $ 619.84

Collection costs, if applicable, adjustments, etc. (explain below) $

AMOUNT OF CHECK $ 619.84

0517

12% LIQUIDATED DAMAGES PLUS REASONABLE ATTORNEY FEES WILL BE ASSESSED ON ALL DELINQUENCIES

TERRA TRUCKING
330 CAMINO MATEO
SAN MARCOS CA 92069

.036

REPORT FOR: 04/78

DATE DUE: 05 10 78

EMPLOYER NO: 501001

PAGE 001 OF 2

.7000

I CERTIFY THAT THE EMPLOYEES LISTED HEREON ARE COVERED UNDER A WRITTEN PENSION AGREEMENT LABOR CONTRACT CALLING FOR CONTRIBUTIONS ON THEIR BEHALF AND THAT THIS LIST INCLUDES ALL SUCH EMPLOYEES AND NO OTHERS.

Authorized Signature: G. [illegible]
Date 4-8-78 Title [illegible]

	SOCIAL SECURITY ACCOUNT NUMBER	EMPLOYEE'S NAME LAST NAME	INITIALS	LOCAL UNION NUMBER	DATE OF HIRE	DATE OF TERM	HRS	TOTAL DUE FOR MONTH
1	544 68 0464	WOJCIECHOWSKI	G	036				
2	564 84 9746	REEVES	D	36			82.7	57 69
3	573 82 2623	RECUPIDO	FJR	36			120.9	84 63
4	792 40 5385	FAUST	C	36			9.25	6 48
5	345 32 4026	BYRNES	J	36			8.5	5 95
6	516 68 1521	LILLY	W	36			57.25	40 70
7	571 01 3246	LILLY	R	36			126.00	88 20
8	560 46 3209	HART	R	36			90.0	63 00
9		[illegible]						
10	554 86 9197	DREW	T	36			2.0	1 40
11	564 60 4822	BEATTY	WM	36			37.5	26 25
12	215 42 6709	KENNEDY	A	36			150	12 60
13	449 72 6509	MARON	A	36			45.0	31 50
14	555 08 1619	SMITH	K	36			133.0	93 10
15	559 48 0893	SHEPARD	WL	36			63.7	44 10
16	574 62 1818	GRIDER	WM	36			44.25	30 97
17	553 76 2263	HURLEY	MJ	36			20.25	14 17
18	560 32 6637	KELLY	A.S	36			10.25	7 18

By submitting this document, we agree to be bound by the above Trust and the Plan and actions of its Trustees.

NEW EMPLOYEES – Add to bottom; show date of employment

318

Resp Ex #2 FIRST CARBON

LETTER FROM TEAMSTERS LOCAL 36 SECRETARY-TREASURER TO TERRA TRUCKING COMPANY, DATED AUGUST 10, 1978 [GENERAL COUNSEL'S EXHIBIT #6]

[Agency Record, p. 154, admitted into evidence, Agency Transcript, p. 97]

Teamsters Union, Local No. 36
2001 Camino Del Rio South
San Diego, California 92108
(714) 299-3550

Terra Trucking
330 Camino Mateo
San Marcos, CA 92069

Dear Sir:

This is to advise that you have several employees who are not members in good standing of this Local Union. In accordance with Section 26 of the Master Labor Agreement, we hereby request that they be removed from your employ and not be rehired until properly cleared by this union.

The employees are listed below:

W. Beatty—SS #504-60-4802
M. Byrne—SS #551-06-0930
J. Byrne—SS #345-22-4036
T. Drew—SS #554-86-9197
A. Kennedy—SS #-95-42-6704
A. Maron—SS #449-72-6504
L. Shepard—SS #558-48-0893

Thank you for your cooperation in this matter.

Very truly yours,

/s/ John S. Lyons
John S. Lyons
Secretary-Treasurer

JSL:md

UNFAIR LABOR PRACTICE CHARGE, FILED OCTOBER 20, 1978, BY PETITIONER LARRY SHEPARD

[Agency Record, p. 1]

FORM NLRB-501 (1-78)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved
Budget Bureau No. 44-R009.2

CHARGE ALLEGING UNFAIR LABOR PRACTICE UNDER SECTION 8(a) OF THE ACT

INSTRUCTIONS: File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No. 21-CE-120

Date Filed 10-20-78

1. CHARGE FILED AGAINST: Employer and Labor Organization ☐ Employer ☐ Labor Organization ☒

a. Name of Labor Organization (Give full name, including local name and number)	b. Union Representative to Contact	c. Phone No.
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 36	Hugh MacDonald Ed Galeves	(714) 299-3550

d. Address (Street and number, city, State and ZIP code)
2001 Camino Del Rio South
San Diego, California

e. Name of Employer Broker Terra Trucking Company	f. Employer Representative to Contact Fred DeCupido, Jr.	g. Phone No. 714 741-9350

h. Location of Plant Involved (Street, city, State and ZIP code)
1941 Rudy Road
Escondido, California 92026

i. Type of Establishment (Factory, mine, wholesaler, etc.) Trucking Broker	j. Identify Principal Product or Service Trucking	k. No. of Workers Employed

The above-named labor organization or its agents, and/or employer has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(a) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, places involved, dates, places, etc.)

Since on or about August 1, 1978, the above-named union has entered into a contract with Terra Trucking Company under the terms of which Terra Trucking agreed to cease using and dealing with the charging party and others, who were independent contractors, because they were nonmembers of Local 36.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)
Larry Shepard

4a. Address (Street and number, city, State and ZIP code) 204 Orleans Avenue, Escondido, California 92027	4b. Telephone No. 714 743-1965

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: Karen Dutton Wilhoit, II (Signature of representative or person filing charge) — Attorney (Title, if any)

Address: National Right to Work LDF, 8316 Arlington Blvd., Suite 600, Fairfax, Virginia 22038 — 703 573-7010 (Telephone number) — October 17, 1978 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

U.S. GOVERNMENT PRINTING OFFICE : 1979—720-617/7311 3-1

NLRB ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT, AND NOTICE OF HEARING, DATED JANUARY 29, 1979

[Agency Record, pp 2-8]

It having been charged in Case No. 21-CE-197 by California Dump Truck Owners Association, Inc., herein called CDTOA, that Teamsters Local Union #36, herein correctly designated Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and called Respondent Union, and Associated General Contractors of America, San Diego Chapter, Inc.; San Diego Building Contractors Association; and Engineering & General Contractors Association, herein called Respondent Employer Associations, and all collectively called Respondents, and in Case No. 21-CE-220 by Larry Shepard, an individual, herein called Shepard, that Respondent Union, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDERS, pursuant to Section 102.33(c) of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Consolidated Complaint and Notice of Hearing, and alleges as follows:

1. (a) The charge in Case No. 21-CE-197 was filed by CDTOA on December 19, 1977, and a copy thereof was served on Respondents on the same date by registered mail.

(b) The charge in Case No. 21-CE-220 was filed by Shepard on October 20, 1978, and a copy thereof was served on Respondent Union on the same date by registered mail.

2. Respondent Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. (a) Respondent Employer Associations, and each of them, are associations comprised of various employers who are engaged in business as contractors or subcontractors in the building and construction industry in Southern California, which exist for the purpose of, and do engage in, collective bargaining on behalf of their respective employer-members with various labor organizations, including Respondent Union.

(b) The employer-members of Respondent Employer Associations, in the aggregate, annually purchase and receive goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

(c) Respondent Employer Associations and their employer-members are, and each of them is, employers engaged in commerce and businesses affecting commerce within the meaning of Section 2(6) and (7) and Section 8(e) of the Act.

4. At all times material herein, the owner-operators of for-hire dump trucks utilized by the employer-members of Respondent Employer Associations in connection with their business operations in Southern California have been, and are now, independent contractors within the meaning of Section 2(3) of the Act and persons within the meaning of Section 2(1) and 8(e) of the Act.

5. Terra Trucking Company, herein called TTC, is a company engaged in the business of providing referral services within the building and construction industry in Southern California, acting as a broker for owner-operators of for-hire dump trucks. In connection with its business as a broker, TTC subcontracts the removal and/or delivery contracts it receives from employer-members of Respondent Employer Associations to owner-operators, including, but not limited to, Shepard.

6. On or about May 20, 1974, TTC and Respondent Union entered into and executed a Short Form Master Construction Agreement which by its terms and conditions, incorporated all of the provisions of the Master Labor Agreement, herein called the MLA, between Respondent Union and Respondent Employer Associations.

7. On or about August 4, 1977, Respondent Union and Respondent Employer Associations, on behalf of their employer-members, entered into and executed a successor multi-trades MLA covering San Diego County and San Clemente Island, California, effective from June 16, 1977, until on or about June 15, 1980.

8. Section 4, and Sections 42(B)(1), 42(B)(2), 42(B)(3), 42(B)(4), 42(B)(9), 42(B)(11), 42(B)(12), and 42(B)(13) of the MLA read, *inter alia*, as follows:

SECTION 4

WORK COVERED

Work covered by this Agreement shall include all job-site work performed by the EMPLOYER or its subcontractor for the construction, in whole or in part, or the improvement or modification thereof, any building structure or other work and operations which are incidental thereto, and the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities used in connection with the performance of

the aforementioned jobsite work and services, and shall include without limitation the following types of classes of work:

• • • • • • •

4. So far as it is within the control of the EMPLOYER or his subcontractor, all materials, supplies and equipment used on the job shall be transported to or from or on the site of the work by workmen furnished by the appropriate craft UNION signatory hereto. Nothing herein contained shall be construed to prohibit the normal delivery of freight by common carrier.

• • • • • • •

SECTION 42

Teamster Working Rules

• • • • • • •

B. Owner-Operator:

1. The EMPLOYER may obtain trucks or equipment from any source, however, the operators on such trucks or equipment will be properly cleared before starting to work on the second day. The Owner-Operators of such trucks or equipment must furnish proof of legal or registered ownership. In order for the Owner-Operator to be properly cleared, he must present himself and proof of legal or registered ownership at the UNION'S office, and once properly cleared, such clearance is valid in San Diego County until there is a change in the Owner-Operator's equipment status .

2. The EMPLOYER may procure Owner-Operators from a person, firm, corporation or other business entity which is signatory to an agreement with the Union, and who are making proper fringe benefit payments. Such person, firm, corporation or other business entity

will be considered for the purposes of this Agreement to be a subcontractor.

Should any portion of the Owner-Operator language contained in this Agreement be ruled null and void or unenforcable [sic] by a court of competent jurisdiction or the NLRB, said ruling effecting that section of the Owner-Operator language shall immediately be deemed to be incorporated into this Agreement until the provision of Section 10 (General Saving Clause) are invoked.

3. The Contractor expressly reserves the right to control the manner, time, means and details of, and by which the Owner-Operator performs his services, as well as the ends to be accomplished, and shall be the sole judge of the capability of the Owner-Operator's equipment to perform the work required to be performed and may, if the Contractor determines that the Owner-Operator equipment is not capable of performing the work required to be performed, terminate such Owner-Operator's services. Failure to work the day or one-half (½) day out, as directed, shall terminate the Owner-Operator's employment; and he shall be paid only for actual time worked prior to such failure. The Contractor shall not pay for time spent by the Owner-Operator in repairing, servicing, or maintaining his equipment after termination of employment or before or after his shift or half-shift, as the case may be.

4. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to him, except as provided elsewhere in this Section and except that in the event that it is determined that the services of an Owner-Operator were terminated, any payment for time lost shall be limited to the wage and fringe benefit payments provided in

this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that the Owner-Operator shall not be subject to the provisions of paragraphs 1, 2, 3, 4, 4(a), 4(b), 4(c) of Section 26 of this Agreement.

• • • • • • •

9. It is further mutually understood and agreed that the intent of this Section is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement.

• • • • • • •

11. Notwithstanding any other provision of this Agreement, this Section 42 shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done under Section 4.

12. If the EMPLOYER through a three man committee, selected in accordance with the procedure described in the Stewards Clause contained in Section 14, is found violating any portion of this section, the EMPLOYER shall immediately pay for each owner-Operator with respect to whom the EMPLOYER is in violation, a sum equal to one day's pay at the highest hourly rate covering wage and fringe benefit costs under this Agreement for each day or portion thereof the violation occurred, such money to be made payable to the Leukemia Society, San Diego Chapter, by check and promptly mailed to Teamsters, Local No. 36.

13. When a truck or piece of equipment is driven or operated by its owner and is used on work covered by this Agreement, the Owner-Driver or operator of

said truck, or piece of equipment shall receive a rate of pay not less than that specified in this Agreement and shall be subject to the terms and conditions of this Agreement.

• • • • •

9. By the acts and conduct described in paragraphs 7 and 8 above, Respondent Union and Respondent Employer Associations, and each of them, have entered into, contracts or agreements, express or implied, whereby the employer-members of Respondent Employer Associations have ceased or refrained, or have agreed to cease or refrain, from doing business with other persons.

10. By the acts and conduct described in paragraphs 7 through 9 above, and by each of said acts, Respondent Union and Respondent Employer Associations have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(e) of the Act.

11. The acts of Respondents described in paragraphs 7 through 10 above, occurring in connection with the operations of Respondent Employer Associations described in paragraph 3 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

12. The acts of Respondents set forth above constitute unfair labor practices affecting commerce within the meaning of Section 8(e) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 21st day of May 1979, at 9 a.m., PDT, in Room 2-N-20, U. S. Courthouse, 940 Front Street, San Diego, California, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above consolidated complaint, which time

and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as Amended, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondents shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to said consolidated complaint within 10 days from the service thereof and that unless they do so all of the allegations in said consolidated complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of their answers, Respondents shall serve copies thereof on each of the other parties.

DATED at Los Angeles, California, this 29th day of January 1979.

/s/ WILFORD W. JOHANSEN
Wilford W. Johansen
Regional Director
National Labor Relations Board
Region 21
606 South Olive Street, 24th Floor
Los Angeles, California 90014

ANSWER TO CONSOLIDATED COMPLAINT BY TEAMSTERS LOCAL 36, DATED FEBRUARY 8, 1979 (EXHIBITS A AND B ATTACHED).

[Agency Record, pp. 9-20]

COMES Now Respondent Union Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter "Respondent Union Local 36," and answers the Complaint herein, on behalf of Respondent Union Local 36 only, as follows:

1. Respondent Union Local 36 admits the allegations of Paragraph 1(a) and Paragraph 1(b) of the Complaint.

2. Respondent Union Local 36 admits the allegations of Paragraph 2 of the Complaint.

3. Respondent Union Local 36 admits the allegations of Paragraph 3(a), Paragraph 3(b), and Paragraph 3(c) of the Complaint.

4. Respondent Union Local 36 denies specifically and generally each and every material allegation of Paragraph 4 of the Complaint.

5. Respondent Union Local 36 denies specifically and generally, jointly and severally, each and every material allegation of Paragraph 5 of the Complaint. Respondent Union Local 36 further alleges that Terra Trucking Company is an Employer within the meaning of the National Labor Relations Act.

6. Respondent Union Local 36 admits the allegations of Paragraph 6 of the Complaint.

7. Respondent Union Local 36 admits the allegations of Paragraph 7 of the Complaint.

8. Respondent Union Local 36 admits that Section 42 as set forth in Paragraph 8 is correctly reproduced in the

Complaint. Respondent Union Local 36 denies each and every remaining material allegation of Paragraph 8 of the Complaint.

9. Respondent Union Local 36 denies specifically and generally, jointly and severally, each and every material allegation of Paragraph 9 of the Complaint.

10. Respondent Union Local 36 denies specifically and generally, jointly and severally, each and every material allegation of Paragraph 10 of the Complaint.

11. Respondent Union Local 36 denies specifically and generally, jointly and severally, each and every material allegation of Paragraph 11 of the Complaint.

12. Respondent Union Local 36 denies specifically and generally, jointly and severally, each and every material allegation of Paragraph 12 of the Complaint.

First Affirmative Defense

I

In parallel litigation involving the same Master Labor Agreement Respondent Union Local 36 executed a Settlement Agreement, a copy of which is attached hereto, marked Exhibit A, and incorporated herein by this reference as though set forth at length. Under the terms of that Settlement Agreement which, as of this date, has not been approved by the Regional Director, Respondent Union Local 36 agreed not to enforce Section 4 of the Collective Bargaining Agreement in violation of the National Labor Relations Act.

Second Affirmative Defense

II

At the insistence of the National Labor Relations Board amendments were effected to the Master Labor Agree-

ment. A copy of those amendments is attached hereto, marked Exhibit B, and incorporated herein by this reference as though set forth at length. Under the terms of those amendments Paragraph 4 of Section 4 was deleted from the Master Labor Agreement.

THIRD AFFIRMATIVE DEFENSE

III

The provisions of the Master Labor Agreement as set forth in Section 42 constitute a valid subcontracting clause within the construction industry under recent Board decisions including *Electrical Workers Local 6,* 240 NLRB No. 18 and *New Jersey Carpenter Locals,* 240 NLRB No. 52.

WHEREFORE, Respondent Union Local 36 prays that the Complaint and Notice of Hearing issued in this matter be dismissed.

San Diego, California
February 8, 1979

DOMNITZ AND PROCHAZKA
A Professional Corporation

By: /s/ RICHARD D. PROCHAZKA
Richard D. Prochazka

Attorneys for Respondent Union Local 36

Form NLRB-4775
10-74

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of: OPERATIVE PLASTERERS' AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL UNION 744, ET AL. AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., ET AL.
Case No. 21-CE-195

SETTLEMENT AGREEMENT

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE.—Upon approval of this Agreement, the Charged Party will post immediately in conspicuous places in and about its place(s)/office, including all places where notices to employees/members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notices marked as part hereof, and Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notices to the Regional Director who will forward them to the employers whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting.

COMPLIANCE WITH NOTICE.—The Charged Party will comply with all the terms and provisions of said Notice.

[illegible]

It is understood that the signing of this Settlement Agreement by the Charged Parties does not constitute an admission that they have violated the Act.

REFUSAL TO ISSUE COMPLAINT.—In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 10 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case.

PERFORMANCE.—Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE.—The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in this case.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL UNION NO. 36, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
(Charging Party)

By: [signature] (Name and Title) Secy-Treas.

Date: November 29, 1973

Recommended By: _____ (Board Agent)

Date: _____

BIDDLE/CARTER DEVELOPMENT CORPORATION
(Charged Party)

By: _____ (Name and Title)

Date: _____

Approved By: _____ Regional Director National Labor Relations Board

Date: _____

14
EXHIBIT A-1

FORM NLRB-4723
(10-70)

NOTICE TO MEMBERS

POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT invoke, maintain in effect, give effect to, or enforce Sections 4 and 4.4, 26.7, 31.1, the third full paragraph of the preamble to 32, 32(d), and 37 of the Master Labor Agreement for San Diego County (herein called MLA), insofar as said provisions relate to subcontracting any work other than work to be performed at the site of construction, alteration, painting, or repair of any building, structure, or other work.

WE WILL NOT invoke, maintain in effect, give effect to, or enforce Sections 15(a) and 26.7, insofar as said provisions permit the withholding of services, engaging in a strike or work stoppage, or any other economic action to enforce the subcontracting restrictions therein.

WE WILL NOT invoke, maintain in effect, give effect to, or enforce the above-mentioned clauses of the MLA, whereby AGC, BCA, and EGCA cease or refrain, or agree to cease or refrain, from doing business with any other person within the meaning of Section 8(e) of the Act.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL UNION NO. 36, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

(Labor Organization)

Dated: November 20, 1978 By: John C. Lyons

(Name and Title)

John C. Lyons, Secy-Treasurer

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Region 21
606 South Olive Street, 24th Floor
Los Angeles, California 90014

15

EXHIBIT B

PURPOSE

The purpose of this Amendment is to amend the Agreement entered into the 16th day of June, 1977, by and between members of the Associated General Contractors of America, San Diego Chapter, Inc.; San Diego Building Contractors Association; Engineering and General Contractors Association; for themselves on behalf of their signatory members, parties of the first part, hereinafter referred to as the EMPLOYERS, and the Southern California District Council of Laborers and its affiliated Local Union 89, affiliated with the Laborers International Union of North America, AFL-CIO; Operative Plasterers and Cement Masons International Association, Local Union 744; Building Material and Dump Truck Drivers Teamsters Local Union No. 36, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and the San Diego County District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Southern California Pipe Trades District Council No. 16 of the United Association, Local No. 230, as follows:

AMENDMENTS

I

Section 4, Paragraph 4 shall be deleted from the Agreement.

II

Section 4, Paragraph 6 shall be amended to delete the following sentence at the end of Paragraph 6:

> "Jobsite limitations as described above do not apply to the Teamsters."

III

Section 15, paragraph A, second sub-paragraph, is amended to read as follows:

> "The Union shall have the right to withhold workmen or picket the job of any individual Employer who is, or whose signatory subcontractor is, in violation of the wage payment, piece rate, or conference board decision(s) and shall when ordered by the Trustees of any Trust covered by this agreement, withhold workmen from any Employer for failure to make trust fund contributions or submit business records, books and reports pertaining to the payment of wages and fringe benefits."

IV

Section 26, Paragraph 7, shall be amended so that the seventh sentence reads:

> "The EMPLOYER will be held responsible for the payments of his signatory subcontractor required by this paragraph."

The following sentence which reads:

> "If the payments are not paid within seven (7) days, the General Contractor shall remove the subcontractor from his job(s)."

shall be deleted. In all other particulars, Section 26, Paragraph 7, shall be as set forth in the Agreement.

V

Section 31, PROHIBITION OF PIECE RATES, Paragraph 1, shall be revised so that Paragraph 1 reads in its entirety as follows:

"1. It is deemed a violation of this Agreement to pay any workman on the basis of other than wage rates, and the use of piece work or a lumping of the work, or any other subterfuge payment in lieu of hourly wages, is to be considered sufficient evidence of breach of contract."

VI

In Section 32, the second sentence of the third paragraph shall be amended to read as follows:

"All employees of signatory Subcontractors will perform work at the appropriate hourly rate and will be reported to such trust funds as required by the Collective Bargaining Agreement."

VII

Section 32, Paragraph C shall be amended to read as follows:

"C. In the event the EMPLOYER'S signatory Subcontractor does not pay the wages, benefits or Trust Fund contributions required by this Agreement, the EMPLOYER shall become liable for the payment of wages and benefits to the signatory Subcontractor's employees and for the payment of Trust Fund contributions to the Trust Funds without regard to whether any specific employee enjoys the benefit of such contributions, whichever is applicable."

VIII

Section 32, Paragraph D, shall be deleted.

IX

Section 32, Paragraph E(6), shall be deleted.

X

Section 37, CARPENTERS SPECIAL CRAFT WORKING RULES & WAGES, Paragraph A, shall be amended to read as follows:

> "A. The Employer shall not require his employees, and it shall not be grounds for discharge or deemed a violation of this Agreement for any individual employee to refuse to cross any lawful primary picket line."

Except as specifically amended hereinabove, the said Master Labor Agreement for San Diego County covering construction work by Carpenters, Cement Masons Local Union No. 744, Laborers Local Union No. 89, Teamsters Local Union No. 36, and Pipefitters Local Union No. 230, shall be as provided in the Agreement effective June 16, 1977 through June 15, 1980.

AGREED this 16th day of August, 1978.

/s/ Geo. Martinez

/s/ Joseph C. Morgan
OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL UNION 744

/s/ Joe R. Alvarado

/s/ Harry Jordan
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 89

/s/ John S. Lyons
BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL UNION 36

/s/ Michael Punce
PILE DRIVERS, BRIDGE, WHARF AND DOCK BUILDERS, LOCAL UNION 2375

/s/ William A. Rae
CARPENTERS DISTRICT COUNCIL OF
SAN DIEGO COUNTY

/s/ Colin C. Bell
SAN DIEGO COUNTY BUILDING AND
CONSTRUCTION TRADES COUNCIL

/s/ *Illegible* *Illegible*
SOUTHERN CALIFORNIA PIPE TRADES
DISTRICT COUNCIL NO. 16 OF THE
UNITED ASSOCIATION, LOCAL NO. 230

/s/ *Illegible* *Illegible*
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, SAN DIEGO CHAPTER, INC.

/s/ John C. Read

/s/ *Illegible* *Illegible*
SAN DIEGO BUILDING CONTRACTORS
ASSOCIATION

/s/ *Illegible* *Illegible*
ENGINEERING AND GENERAL
CONTRACTORS ASSOCIATION

November 20, 1978

ANSWER OF ASSOCIATED GENERAL CONTRACTORS AND OTHER EMPLOYERS READ INTO THE RECORD AT THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE ON AUGUST 27, 1979

[Agency Transcript, pp. 159-160]

MR. BELL: At Mr. Petering's request, I have gone through the Answer, and I am prepared to read into the record the specific responses to each of the paragraphs of the Complaint to clarify the letter sent by Mr. Wells on August 23rd which serves as a general denial and a response to the Answer in furtherance of his discussion with Mr. Petering.

JUDGE STEVENS: Fine.

MR. BELL: Paragraph 1, 2, 3 and all subparagraphs of the Complaint are admitted.

Paragraph 4 is denied.

Paragraph 5 is denied.

Paragraph 6 is denied.

Paragraph 7 is admitted.

Paragraph 8 is admitted as to Section 42, but denied as to Section 4.

Paragraph 9 is denied.

Paragraph 10 is denied.

Paragraph 11 is denied, and Paragraph 12 is denied.

MR. PETERING: What was 7; was 7 admitted?

MR. BELL: The way you say that makes me want to go back and look at 7.

(Pause.)

Paragraph 7 is admitted.

JUDGE STEVENS: All right, thank you. Is that accepted?

MR. PETERING: Yes, excellent. That's what I wanted.

JUDGE STEVENS: All right. That now will become a portion of the formal pleadings.

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EXCERPTS FROM THE TESTIMONY OF FRED RECUPIDO, JR., AT THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE ON AUGUST 27, 1979

[Agency Transcript, pp. 58-61, 63-66, 68, 70-71, 73, 77-79, 89-91, 94-113, 115, 119-126, 130-131, 157-158]

[Tr. 58]

Fred Recupido, Jr.

was called as a witness by the General Counsel and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Petering) State your full name and address for the record, please?

A. My name is Fred ReCupido, Jr., R-e capital C-u-p-i-d-o, Jr. 1941 Ruby Road, Escondido, California.

Q. How are you employed, Mr. ReCupido?

A. I am self-employed.

Q. And what is the form of your self-employment?

A. I'm the owner of Terra Trucking Company based in Escondido.

Q. What is Terra Trucking Company?

A. Terra Trucking Company is by definition a prime or overlying carrier for hire in the State of California.

Q. Before I get into that—is it a corporation, a——

A. No, sir. It's a sole proprietorship.

Q. Sole proprietorship. And you are essentially Terra [Tr. 59] Trucking, then?

A. Yes, sir.

Q. All right. Now, we're getting into trade terms. Can you explain what a prime or overlying carrier is?

A. A prime or overlying carrier is or could be any per-

mitted carrier in the State of California. In my instance, I engage sub-haulers and I must have a sub-haul bond or surety bond on file with the Public Utilities Commission. And I engage sub-haulers to work in my behalf for contractors that are my customers.

Q. And the sub-haulers, do they have their own California permits?

A. Yes, sir.

Q. Do any of your sub-haulers not have California permits?

A. No. That's a violation of the law.

Q. So the difference between being an overlying carrier is the requirement for a bond; is that correct?

A. No. Any carrier or any dump truck carrier could be a prime carrier, but if he were to engage sub-haulers he would then at that time have to have a bond.

Q. Okay, maybe I'm interchanging, but I do want to get this straight.

That's what makes him a prime carrier into an overlying carrier?

[Tr. 60] A. Well, a prime carrier would be, for example, would be the answer that Mr. Shepard could be a prime carrier if he were to bill the contractor direct. He at that time would be a prime carrier, for the purposes of what you're asking.

Q. I'm not sure I got an answer to the question. Let me try it just one more time.

What makes you an overlying carrier, though, is the bond; is that correct?

A. Right. I'm allowed by law to bill the contractor and collect the moneys for other permitted carriers, and, in turn, pay them. I have to be bonded for that particular——

Q. And that's the only real difference between you and any other prime carrier?

A. Right.

Q. Now, does Terra Trucking have any businesses or operations other than acting as a broker or as an overlying carrier?

A. Yes, sir. I also am a lessor of bottom dump trailer equipment.

Q. And what kind of—how much equipment and what types do you have?

A. We have 12 sets of bottom dump doubles of various makes and manufacturers.

Q. Now, explain how the operation as an overlying carrier [Tr. 61] operates.

A. Well, I have certain contractors that call me for their supply of trucks, whatever they may need. He'll call—a contractor may call or a customer would call and order a specific amount of trucks, a certain type of trucks, and tell me where he would want them and what time he'd want me to be there.

Q. Do you have a written agreement or a written contract with these contractors?

A. No, sir.

Q. How do you come to be know that they can procure trucks from you?

A. Most of it is word of mouth, tradition, personal friendships, things of that sort.

Q. All right. So, there's no binding agreement that they have to call you if they need trucks?

A. No, absolutely not.

Q. About how many what you describe as contractors do you have this relationship with?

A. How many?

Q. Where they will call you up if they need trucks; how many?

A. Just contractors, or customers in all?

Q. Customers in all.

A. Oh, I would say in the neighborhood of 100 to 150.

• • • • •

[Tr. 63] Q. No. Give me an example of what happens when they need trucks—say Industrial Asphalt places an order with you. How would your business operate from that point?

A. Industrial would call me, the dispatcher usually or the scale man who is the scale man dispatcher, would call me and say I'd like to set up 10 trucks for tomorrow, the plant starts at 6:30; and he would in some instances tell me where they would be going.

Q. When you say in some instances, wouldn't they always give a——

A. Well, not necessarily. They might call for 10 trucks and they would have given maybe seven different locations to go to—take two and send them here, and they might split them up, or they all might go to the same place. That would be their determining factor when they received them at the plant.

[Tr. 64] And then I would ask where they were going to so I could determine what the ton mile rate would be for the commodity.

Q. Is that because asphalt is a ton mile commodity?

A. Right.

Q. They place an order for 10 trucks; then what do you do?

A. Well, the 10 trucks, I either wait by the telephone for the guys; sometimes they call in, sometimes I have to call them to find out if they're working the next day. And I'll just schedule 10 trucks out of the group that I might have running the previous day and send them over there, tell them what time to be there, who the shipper would be and who the receiver might be, and the pertinent rate information; and they in turn would hopefully report their

time they were dispatched. And at the end of the day they would make a freight bill out and submit that freight bill to me at the end of the day or at the end of the week.

Q. You said the guys. Now, who are the guys that——

A. All right. The guys are the different sub-haulers that I engage under a Sub-Hauling Contract.

Q. We've already admitted into evidence this General Counsel's Exhibit 3, a copy of a document entitled Sub-Haul Agreement, and it appears to be between Terra [Tr. 65] Trucking and Larry Shepard. I'm showing you a copy of that document. Is that your standard Sub-Hauling Agreement?

A. Yes, sir.

Q. And how many Sub-Hauling Agreements do you have with various individuals?

A. Currently on file?

Q. Currently on file.

A. Between 200 and 250.

Q. Do you receive 200 to 250 phone calls every night from——

A. No, sir.

Q. Do you have a regular group of sub-haulers that——

A. I have a corps of individuals who use my services on a regular basis.

Q. And how many would that be?

A. On a regular basis, 25 to 30, on a regular basis.

• • • • •

[Tr. 66] MR. PETERING: Okay, I'll withdraw that question.

Q. (By Mr. Petering) Do you know if any of your regular sub-haulers have Sub-Haul Agreements with any other brokers?

A. Oh, absolutely. Yes, they do.

Q. Do you know which—can you name them, both the individuals and who they have Sub-Hauling Agreements with?

A. Certainly. Richard Hart, he has Sub-Haul Agreements probably with at least 10 other brokers in San Diego, L.A., Orange County. Ron Boone, he's a sub-hauler that works for me occasionally in Riverside-San Bernardino area. Walter Sassaman, Thomas Drew. How many would you like me to name?

Q. Out of the 20 or so or 30 regular individuals that utilize your services, how many would you say?

A. Out of my 30 regulars, I'd say 12.

Q. And if you know, out of your total number of 200 to 250, how many have Sub-Haul Agreements——

A. Two hundred or better.

• • • • •

[Tr. 68] Q. Do you ever go out in the field and check at all?

A. On the jobs?

Q. Yes.

A. Sometimes, yes.

Q. And what are you checking for?

A. Most occasions I'll go out there to see if the contractor is satisfied with his service and to see the length of the job, how long the job is going to last for my planning purposes. Basically that's all I do, plus also probably get preliminary lien information.

• • • • •

[Tr. 70] Q. Do you make any deductions other than or in addition to your five percent fee or/and the 20 percent trailer [Tr. 71] rental?

A. On occasion, I have a fuel deduction or occasional parts deductions on occasion.

Q. Well, do you supply these individuals with fuel?

A. No, I don't. I have an account at Inland Oil Company,

and for the purposes of bulk buying power, all of us buying together at one time, I have an account with Inland and we do get a cheaper rate on the fuel. As far as making a profit on it or anything like that, no. It's strictly whatever the fuel costs me is passed is passed on to them. And it's just kind of a group thing to try to everybody out, to beat the cost of the high fuel.

• • • • •

[Tr. 73] Q. Now, when you call your sub-haulers the night before or they call you for the next day's work, do you specify a rate that they're going to be compensated?

A. Yes, usually. That is the procedure.

• • • • •

[Tr. 77] Q. So he becomes one of your sub-haulers without a Sub-Haul Contract?

A. At the moment, yes, but what I do is I—if that situation does arrive, when I get his freight bill in the mail and I don't recognize the name of who's this guy, I just check to see what job he was on at that time, and I will send him a Sub-Haul Agreement form to fill out. He will fill that Sub-Haul Agreement out before he receives his check. That's required by law.

Q. Is Terra Trucking signatory to a collective bargaining agreement?

A. Yes.

Q. At this time?

A. Yes.

Q. What kind of agreement and who is it with?

A. It's a Short Form Agreement with Teamsters Local 36.

[Tr. 78] Q. When did you become signatory; when did Terra become signatory to this agreement?

A. We became signatory to this agreement in, I believe it was in May or June of 1974. I believe that was the date; I could be in error.

Q. Is it still in effect today?
A. Yes.

Q. Do you recall when the last occasion was that you renewed that agreement? The '74 one would presumably have expired between '74 and '79.

A. It was in—I can't recall the month. It was in 1977 that I did sign the renewal. I believe it was March of 1977.

Q. And what does the Short Form Agreement require, in essence?

A. Well, it required that—well, it requires that I—any of my employees that I might have be paid the proper fringe benefits and vacation, holiday pay, and that sort of thing. At the time I signed it, I really didn't read it, I just signed it so I could go back to work.

Q. A Short Form Agreement generally requires a signatory to adhere to the terms of another labor agreement. Which agreement would this Short Form require you to adhere to?

A. Master Labor Agreement.

Q. Now, did you ever receive any communications from [Tr. 79] Teamsters Local 36 concerning your sub-haulers and this collective bargaining agreement?

A. Yes, I did.

Q. And when did this happen?

A. In September of last year, 1978, I received a letter from Teamsters Local 36 advising me that the people I had sub-hauling for me at that time—I believe they used the term "employee"—but there were certain individuals that I was engaging their services and they were not members of Teamsters Local 36, and they advised me this was in direct conflict with the Short Form Agreement that I signed and they gave me the names of the individuals who were not at that time members of the Teamsters Local in this area.

Q. I'll show you a document I've marked for identification as General Counsel's Exhibit 6. Is that a copy of the letter you were just referring to?

A. Yes, sir.

Q. It's dated August, is it not?

A. Yes, August the 10th.

Upon observing the letter, refreshing my memory, it also specifies that I had to remove these people from the arrangement I had with them to engage their services since they were not members of Teamsters Local 36.

Q. That's a true copy of the letter?

A. Yes, sir.

• • • • •

[Tr. 89] Q. (By Mr. Petering) Looking at General Counsel's Exhibit 6, what happened when you received that letter? What did you do?

A. Well, I read the letter and I took note of the names that were on the letter and I called a meeting for all the fellows who were on the letter plus the individuals who I knew also were not members in the Teamsters Union at that time. And I showed them the letter and told them that I had no choice except to do what the letter required and if the individual was engaged by me as a sub-hauler with his own trailer equipment I could no longer utilize his services, and if the individuals pulling my trailer equipment that I had told him at that time he would have to do —I gave him his five-days notice, in essence, when I gave them a deadline of September 5th to join the Teamsters Union as required by this letter.

Q. Did they, the people named in that letter subsequently join the Teamsters Union?

A. At the time—well, when the deadline time reached, I was under the impression that they had; as it turned out later, a couple did not.

Q. Did you ever stop utilizing any of the people named in General Counsel's Exhibit 6 because they had not joined the Teamsters?

[Tr. 90] A. No.

Q. Did they all subsequently join, to the best of your knowledge?

A. At the time, to the best of my knowledge at the time, yes, they did all join; and as I said, it turned out later that some of them did not.

JUDGE STEVENS: Excuse me, if I may just interject one question, Mr. Petering.

Is this the first time that the Union had ever demanded——

THE WITNESS: With correspondence, yes, sir.

JUDGE STEVENS: All right. Thank you.

THE WITNESS: —telephone conversations, no.

JUDGE STEVENS: Thank you.

Q. (By Mr. Petering) Well, based on that answer, when was the first time that the Union ever contacted you about these owner-operators?

A. Well, they had been in constant contact with us from the time we actually started brokering, which was in 1975, until the recent dealings with the Federal Court. But we were always talking on the phone about owner-operators who were not members of the Teamsters and the constant battle.

Q. Who did you have these telephone conversations with?

A. With Ed Galvez, who is a business agent; with Hugh [Tr. 91] McDonald who at that time was a business agent; with Tony Vallese, is believe is the pronunciation of his name, V-a-l-l-e-s-e, I believe. He's also a business agent for Teamsters Local 36.

Q. And what was the Union's position concerning these owner-operators?

A. The Union's position was that these people were engaged by me and that they would be in the Teamsters Union if they were going to work through me; and that was their position in a nutshell.

Q. All right. Were you ever notified by any agent of the Teamsters Union or anybody else, for that matter, subsequent to September of 1978 that your owner-operators, sub-haulers, no longer had to be members of the Teamsters Union to keep working for you? Did anybody ever contact you and say that what was required in this letter was no longer operative?

A. From the Teamsters Union?

Q. Yes.

A. No, nobody ever contacted me.

MR. PETERING: I have no further questions.

• • • • •

[Tr. 94] JUDGE STEVENS: On the record.

We're ready for cross examination, but beforehand I think we may have a couple of preliminary matters to take care of.

MR. PROCHAZKA: Pursuant to our discussions before the luncheon recess, I checked with the local Union to determine whether or not they had any agreement signed by —or copies of any agreement signed by Terra Trucking Company. The only agreement which they have and the only agreement which reflects in their records is the 14th of May, 1974. They do show that in 1977 a new Pension Trust Contribution Agreement was signed, and that's what the gentleman was referring to, I believe, before we broke for lunch. But their practice is not to sign new Short Forms; they consider these good indefinitely. And so their records reflect no '77 agreement beyond the Pension and that, as I explained earlier, comes from the Trust to the Local and they pass it out and have it signed and pass it back.

JUDGE STEVENS: Well, perhaps we can ask the witness a couple of questions on that one to see that we know where we're going.

Were you familiar with this one, Mr. Petering?

MR. PETERING: No. This will be the first time I've [Tr. 95] ever laid eyes on it.

JUDGE STEVENS: Well, perhaps you and the witness can take a look at this and see what we have.

(Pause.)

MR. PETERING: Well, maybe the most easy thing to do would be for me to put this into evidence.

JUDGE STEVENS: Fine.

MR. PETERING: You don't have any objection?

MR. PROCHAZKA: No, I have no objection. As a matter of fact, that's why I was pushing the time because I asked her to run enough copies so that we would have enough.

MR. BOTTGER: May I see a copy of that?

JUDGE STEVENS: Yes, sir.

I notice on the outside of it it's labeled Short Form Agreement, so perhaps yes, if we could let Mr. ReCupido take a look at this and maybe he can tell us where we are.

MR. PETERING: I'll make this my exhibit and mark it as General Counsel's Exhibit 7.

Q. (By Mr. Petering) Okay, Mr. ReCupido, let me show you a document entitled Short Form Agreement and which I've marked for identification as General Counsel's Exhibit 7. Why don't you just take a minute or two and look at that, go over it.

(Pause.)

[Tr. 96] Does that document look familiar, Mr. ReCupido?

A. Yes, it does.

Q. What is it?

A. This is a copy, a photostatic copy of the Short Form Agreement I had signed on the 14th of May, 1974, of which I did not receive a copy. This is not what I was looking for. Apparently I did not get a copy.

Q. Is that the only document similar to that that you can recall signing at this time?

A. At the time I signed this document, I believe I signed the Pension, to sign up for the Pension, and the benefits of the other health and welfare and the other things, and those are the copies of the documents I was looking for, not this here, because I did not have a copy of this.

Q. So that's the only one—the copy of the document in front of you would be the only document that you ever have signed?

A. Right.

Q. Okay.

JUDGE STEVENS: Fine.

MR. PETERING: I move for General Counsel's Exhibit 6 and 7 be admitted into evidence.

JUDGE STEVENS: All right. Any objection?

MR. PROCHAZKA: I have no objection.

[Tr. 97] JUDGE STEVENS: All right, they're admitted without objection.

• • • • •

FURTHER DIRECT EXAMINATION

Q. (By Mr. Bottger) At the time you signed this Short Form Agreement, General Counsel's No. 7, did you have any employees working for you?

A. No, sir.

Q. What is Terra Trucking, is it a corporation, or——

A. Sole proprietorship.

Q. And do you have employees, anyone employed by Terra Trucking now?
[Tr. 98] A. No, sir.

Q. Have you had anyone employed by Terra Trucking between the time you signed the Short Form Agreement and today?
A. No, sir.

Q. So you've only used owner-operators?
A. Yes, sir.

Q. What happens if a contractor calls in, say he wants some trucks—pick an arbitrary number, say 10—to work a certain job, and you send your owner-operators out there to work the job, and come the end of the month you bill the contractor and he doesn't pay. Has that ever happened?
A. Oh, yes, sir. All the time.

Q. What are the consequences in terms of who pays who?
A. Well, by Public Utilities Commission law, I'm bound to pay the sub-haulers on or before the 20th of the month prior to the—or, excuse me, after the work done. So like a billing period of August 1st to August 30th would be paid by September the 20th. If the contractor does not pay, then I am obligated by law to pay, and I either have to float a loan, a temporary or a short-term loan, or dig into my savings if there's any left, and pay the truckers.

Q. And then you have to collect from the contractor?
[Tr. 99] A. I have to collect from the contractor.
Then I'm also in violation of the PUC Code because I can't extend credit to contractors. So if I don't collect my money, I can also be fined for that. So I'm kind of under the gun from two different directions.

Q. You testified about practices and procedures and so forth; I think some of the specific examples you gave pertain to asphalt hauls. Do the same descriptions that you have given in your testimony in terms of procedures deal-

ing with contractors and owner-operators apply to dirt hauls, excavation hauls?

A. In most cases, yes.

MR. BOTTGER: I have no further questions.

JUDGE STEVENS: Mr. Prochazka.

CROSS EXAMINATION

Q. (By Mr. Prochazka) Did I understand you correctly to say that in 1974 Terra Trucking had no employees?

A. Yes, sir, that's correct.

Q. Did you operate under any other name besides Terra Trucking prior to 1974?

A. No. It's been Terra Trucking Company since 1971.

Q. And when did you start brokering?

A. 1975.

Q. Okay. What were you doing prior to 1975?

A. I was an owner-operator, had my own truck.

[Tr. 100] Q. So that when you signed this agreement, you were an owner-operator?

A. Yes, sir.

Q. At that time, did you ever have anyone else driving your truck for you?

A. If I was like ill for a day or so, or anything along those lines.

Q. Did you pay the gentleman who drove your truck for you?

A. Prior to 1975 or '4 or——

Q. Prior to signing this agreement in 1974.

A. Yes.

Q. Did you have one tractor or more than one tractor prior to signing the agreement?

A. One tractor.

Q. Now, in 1978, were you filing Fringe Benefit Reports with the Western Conference of Teamsters Pension Trust Fund?

A. Yes, sir.

Q. And do you know who made those reports out?

A. I did.

Q. Did you file one basically every month?

A. I filed one every month, yes. I still do.

Q. At the present time are you showing any employees on your reports?

[Tr. 101] A. No.

Q. When was the last time you drove a truck yourself?

A. For compensation?

Q. Yes.

A. Or just to drive a truck.

Q. For compensation.

A. It was in April of last year.

MR. PROCHAZKA: How do you want to number Respondent's Exhibits, your Honor.

JUDGE STEVENS: 1, 2, 3.

MR. PROCHAZKA: Do you want Respondent Union, Respondent Employer, or——

JUDGE STEVENS: If we're going to have separate offers, yes, I would prefer to have them separate, so we'll have Employer 1, Respondent's 1.

MR. PROCHAZKA: That's fine.

Might I have this marked as Respondent Union's 1 for identification?

MR. PETERING: Let me see how we have named them in the Complaint, referred to them in the Complaint. Maybe that will be helpful.

MR. PROCHAZKA: Building Material and Dump Truck Drivers is too long. Respondent Local 36——

MR. PETERING: Okay, what we referred to is Respondent Union and Respondent Employer Associations, [Tr. 102] so maybe we could go RU-1 and that sort of thing.

JUDGE STEVENS: Well, whatever. As long as they're separated; I wouldn't want to carry them all under a single respondent.

MR. PETERING: My point was that we should number the exhibits as they are called in the Complaint. So Respondent Union's exhibits and Respondent Employer Association's exhibits.

JUDGE STEVENS: Yes.

MR. PROCHAZKA: Could the witness have a copy of that document, your Honor? It's a copy of a form bearing at the top the caption "Western Conference of Teamsters Pension Trust Fund," apparently machine-addressed to Terra Trucking, 330 Camino Mateo, San Marcus, California.

JUDGE STEVENS: All right. Do you have a copy for him?

MR. PROCHAZKA: I handed the reporter two.

I presume there's no objection.

Q. (By Mr. Prochazka) Would you look at Respondent Union's Exhibit 1 for identification.

(Pause.)

Do you recognize that document?
A. Uh-huh.

Q. Would you tell us what it is?
A. It's a Pension Trust Fund Report of ours to Western [Tr. 103] Conference of Teamsters.

Q. And reflecting hours worked for which company?
A. Terra Trucking Company.

Q. And who prepared the form?

A. This particular form I believe was prepared by Grace ReCupido, who is my mother.

Q. Does she hold any position with Terra Trucking?

A. No. Not any longer.

Q. Did she at the time that the form was prepared?

A. She helped me do my bookwork, in that position.

Q. Page 2 appears to be a copy of a separate typewritten page; do you know who typed that page?

A. No, I don't. I could have typed it, she could have typed it. I really don't recall.

Q. On the fact of that, there are a list of names, and opposite the number "3" in the left-hand column is an "F. Recupido, Jr." Is that yourself?

A. Yes, it is.

Q. A hundred and twenty point nine hours?

A. Right.

Q. And with respect to each of the names, who made the determination of the number of hours to be recorded?

A. Who made the determination?

Q. Yes.

A. What I would do in this particular case is I would [Tr. 104] draw up the list off the posting sheet of how many hours the individuals had worked on. In this particular instance here, I believe it was a job for Novo-Rados, and I would prepare just roughly a sheet and draw all the hours off that were applicable to the agreement we had with the Teamsters, and they would be transmitted to this sheet here and then sent to the Union.

Q. Looking down at Item 15, that's "L. Shepard." Would that be Mr. Shepard, Larry Shepard, who testified here this morning?

A. Yes, sir.

Q. Does that sheet reflect that he worked only 63.7 hours in the month of April, 1978?

A. No, sir.

Q. What does the 63.7 represent?

A. The 63.7 hours worked represents 63.7 hours worked on jobs that are covered by the Short Form Agreement we had with the Teamsters.

Q. That agreement would not apply to work in Riverside County, would it?

A. Pardon me?

Q. The agreement you have with the Teamsters would not apply to work in Riverside County?

A. No, sir.

Q. Would it apply to work in Orange County?

[Tr. 105] A. No, sir.

Q. Would it apply to work in L.A. County?

A. No.

MR. PROCHAZKA: Move the admission of Respondent's Union Exhibit 1.

JUDGE STEVENS: Any objection, Mr. Petering?

MR. PETERING: No, objection.

JUDGE STEVENS: All right, thank you. It's admitted.

(The document above referred to was marked Respondent Union's Exhibit No. 1, for identification, and was received into evidence.)

Q. (By Mr. Prochazka) Did you file similar reports for the months of June, July, August, 1978?

A. Yes, sir.

MR. PROCHAZKA: Might I have this marked as Respondent Union's Exhibit 2.

Do you want me to mark them?

JUDGE STEVENS: The reporter usually marks them.

(The document referred to as the Respondent Union's Exhibit No. 2 was marked for identification.)

MR. PROCHAZKA: Respondent Union's 2 for identification is a similar document showing report for 5-78, due date 6-10-78. Might the witness have a copy of Respondent Union's Exhibit 2 for identification, please?

JUDGE STEVENS: Yes. If you'll give him a copy of [Tr. 106] that.

Q. (By Mr. Prochazka) Would you take a look at Respondent Union's Exhibit 2 for identification, please and tell me whether or not you recognize that document?

A. Yes, sir.

Q. And was that sent to Terra Trucking Company?

A. Yes, sir.

Q. And under the column headed "Hours," were those numbers on the form when it was received by Terra Trucking Company, or were those entries that the company made?

A. These are entries that the company—or that I had made.

Q. That you made on behalf of the employer?

A. Yes.

Q. And it says "Authorized signature"; is that your signature?

A. Yes, sir.

Q. And did you then transmit this report to The Western Conference Pension Fund?

A. Yes, I did.

Q. And, again, what do the hours under the column headed "Hours" reflect?

A. These hours, again, reflect the number of hours they worked on jobs covered by the Short Form Agreement that

I had signed at the time—I was bound to at the time, with [Tr. 107] the Teamsters Local 36.

Q. They don't reflect necessarily all of the hours worked by any one individual that month?

A. No, sir.

MR. PROCHAZKA: I move the admission of Union's Exhibit 2 for identification.

JUDGE STEVENS: No objection?

MR. PETERING: No objection, your Honor.

JUDGE STEVENS: It's admitted.

(The document above referred to heretofore marked Respondent Union's Exhibit No. 2, for identification, was received into evidence.)

MR. PROCHAZKA: Perhaps by stipulation, your Honor, if I might, I have reports for the next three months also.

JUDGE STEVENS: All right.

MR. PROCHAZKA: We can just mark these as "3"——

JUDGE STEVENS: Do you want to mark all three months?

MR. PROCHAZKA: No. This is the next month. This is for June—it's for the month of June, your Honor, due date July 10, '78.

JUDGE STEVENS: All right.

MR. PROCHAZKA: The next report is a report for the month of July with a due date August 10, Respondent Union's Exhibit 4.

[Tr. 108] (The documents referred to as Respondent Union's Exhibits Nos. 3 and 4, inclusive, were marked for identification.)

MR. PROCHAZKA: And if I might have marked as Respondent Union's Exhibit 5 a copy of a similar document for the month of August with a due date 9-10-78.

(The document referred to as Respondent Union's Exhibit No. 5 was marked for identification.)

• • • • •

[Tr. 108] Mr. Prochazka: Could the witness have Respondent Union's Exhibits 3, 4 and 5.

Q. (By Mr. Prochazka) Do you recognize each of those documents as a report similar to Respondent Union's 1 and 2, which were prepared in the company office and signed by you and then forwarded to the Trust?

A. Yes, sir.

Mr. Prochazka: Move the admission of Respondent Union's 3, 4 and 5.

[Tr. 109] Mr. Petering: No objection.

Mr. Bottger: No objection.

Judge Stevens: They're admitted without objection, and Mr. Gore had to step out for one moment. We'll ask him in a moment. But he indicated before he left at lunch that he had no problem with these.

(The documents above referred to heretofore marked Respondent Union's Exhibits Nos. 3, 4 and 5, for identification, were received into evidence.)

Q. (By Mr. Prochazka) Now, you indicated, sir, that the hours reflected on here were hours worked under the Short Form Agreement.

A. Yes, sir.

Q. How did you determine what hours came under the Short Form Agreement?

A. Well, it wasn't a matter necessarily of what hours came under the Short Form Agreement, it was a matter of what jobs they were working at the time, if they were working hourly jobs in San Diego County or if they were working zone rate or ton mile commodities within San Diego, or if they were working ton mile or distance rate

commodities in Riverside County, or things like that. That's what made the determination.

A gentleman, for example, on the last document there, on No. 5, Exhibit 5, on line 13, Mr. Wade Lilly, he might [Tr. 110] have worked 60.95 hours and the rest would have been a either zone rate or a ton mile commodity-type situation.

Q. Had you ever discussed the filling out of these forms with anybody from The Western Conference of Teamsters Pension Trust Fund?

A. No, sir, I didn't. Not to my recollection, I hadn't.

Q. In other words, you put down, as I understand it, somebody who was working hourly.

A. Uh-huh.

Q. If he was working hourly in Riverside County, did you report him?

A. No, sir.

Q. So that it was limited first to San Diego County.

A. Yes.

Q. And then he had to be working hourly.

• • • • •

[Tr. 111] Q. When you received the letter from Local 36, the August 10th letter, did you at any time tell them that the people in that letter were not your employees?

A. Did I tell who, the business agents?

Q. The Union.

A. Yes, that's what I told them, yes.

Q. When and where did you tell them that?

A. I told them over the phone.

Q. Was that before or after you got the letter?

A. That was before I got the letter. We had had a problem with the Teamsters on several hourly jobs we were running because there were some trucks there that were

not members of Local 36 and the business agent was having a fit, so they had called on several occasions about it, and I guess at that time is when they decided [Tr. 112] they better let me know in writing what the situation was.

Q. Did you at any time respond to them after you received this letter?

A. Yes, sir, but again, only by telephone communication.

Q. And to whom did you speak, and when?

A. I spoke to on one occasion Ed Galvez; on another occasion Hugh McDonald; and then on a third occasion a gentleman by the name of Tony Vallese.

Q. When did you speak to Mr. Galvez, if you recall?

A. I'm trying to recall—we had a conversation, and I cannot remember if it was after this letter or before this letter, at the job site at the S. J. Groves Construction trailer on Interstate 15 about the situation about the situation with owner-operators. But I do believe this was after the letter dated August the 10th.

During the time of the letter and immediately afterwards, I spoke to Mr. Galvez on the phone regarding this situation, and I advised him that I was trying to—or I was having a meeting with my people and was going to advise them that they, according to the letter, had to go down and join the Teamsters Union.

Q. On the Groves job, did you have Terra Trucking trailers working that job?

A. Yes, from time to time, I did, yes.

[Tr. 113] Q. What type of work was going on on the Groves job?

A. We were hauling decomposed granite, which they were using as asphaltic concrete subbase from a commercial decomposed granite pit owned by Bicentennial Materials at Lilac Road and 395; hauling that to the construction project, I-15 and Deer Springs Road. They were mak-

ing the temporary detours and bypasses of the construction right-of-way.

Q. At any time after you received General Counsel's Exhibit 6, did you write a letter or in any way notify the Union that you did not consider those seven people to be your employees?

A. Inasfar as correspondence is concerned?

Q. Yes.

A. No, sir, I did not.

Q. Did you ever write and tell the Union that you didn't think those seven people were involved in job-site work?

A. No, sir.

• • • • •

[Tr. 115] Q. What work were you reporting on that form?

A. I was reporting work—you want contractors?

Q. Well, the type of work.

A. Hourly work for Union contractors; that's the only two types of work I do is ton mile commodities and hourly commodities, so it's either one or the other.

Q. Would you have reported hourly work for non-Union contractors on that form?

A. In some cases, yes.

Q. Had you ever discussed the proper filling out of that form with any representative of Local 36?

A. No.

• • • • •

[Tr. 119] Q. Insofar as this S. J. Groves project, what percentage of hours or proportions, if you know?

A. There are none.

Q. None on these——

A. None.

Q. Okay. When did that project take place?

A. That was in—again, I can't recall, but I believe it was in October of 1978; maybe later than that. We've been in and out of there so many times, I can't recall which time it was that Mr. Galvez descended on us over there on that job and made exception to what was going on.

Q. On cross examination, Respondent Union's counsel asked you if you'd ever sent any correspondence to the Union stating the position that owner-operator sub-haulers were not employees, and you said you had not sent any correspondence. Had you ever discussed this with any members——

A. Many times.

Q. Can you give me an example of when these discussions started and the substance of them?

A. For my purposes as far as my conversations with like [Tr. 120] Mr. Galvez and Mr. McDonald go back as far as 1972, 1973, when I was an owner-operator; and the topic has been the same and unchanging for the last five or six years. It's just different points and times. The last five years we've had our little arguments about this.

As far as purposes for the most recent past, around the time, around the month of May, 1978, we discussed it, and we discussed it again in August when this letter was written. We discussed it again through the September, October, November time. Then, in the first of this year, we discussed it pretty hot and heavy on a couple times on several different jobs right up until the time of the signing of the temporary injunction. In fact, to the day of the temporary injunction when they were in court; in fact, the day the judge signed the temporary injunction, we were on a job arguing about the status of owner-operators.

Q. You were on a job that day?

A. Yes, sir. I was out there talking to the contractor.

Q. What happened that day?

A. I just—I stopped by to bring a part to one of the fellows who was pulling my trailers, and I had a repair to make; and the fellow came into the pit and I changed an air hose. And Mr. Galvez came up, and—or, excuse me, Mr. Vallese came up and he was in a extreme state of [Tr. 121] agitation because there was some non-Union trucks there from Riverside. But due to the truck shortage, I had to bring them down from somewhere, because they had to get the job done.

Q. What sort of project was that?

A. It was a housing project for—the owner was Avco and the general was Palomar Grading and Paving; and we were hauling from a site that they had mined a bunch of granite and stockpiled it over to a commercial building site over in Rancho Bernardo. It was an hourly job.

Q. How far was it from the point of the stockpile to the point where the material was dumped? Do you know?

A. Off the top of my head, I'd say four and a half to five miles, somethere in there.

Q. Now, you said most recently, as early as May of last year, which would have been May '78 you had discussions with Mr. Galvez concerning owner-operators; what was the substance of those discussions?

A. Well, after we discussed the fact that, you know, these people were not my employees and I tried to make the—point out to Ed that I—you know, that I didn't pay any withholding tax or I didn't take any taxes out, I didn't pay any workmen's comp or make any social security contributions in their behalf or any state disability or anything of that nature, and I don't see [Tr. 122] what they were using as a meter to gauge the fact that they were my employees. I mean, what was the determining factor? And he stated, well, that's the way it is, and we've gone downhill ever since.

Q. Were those two positions reiterated then in subsequent conversations?

A. Oh, absolutely. Later on in August, we had a job in closer to the Civic Center here in San Diego down in the middle of the county, and in fact some of the trucks were actually ran off the job by the Teamster B.A. because they were not members of the Teamsters. And they called me up that afternoon, again were extremely agitated because there were non-Union trucks on this job, and they—I know they had talked to a bunch of trucks and a bunch of truck drivers, and, you know, they had not wanted to listen to what they had to say. The job just kept going and the foreman just threw up his hands in disgust, and I think they shut the whole job down.

Q. What job was this?

A. This was a job for Cameron Brothers, and it was in —they were loading I believe from the intersection of Cuyamaca and Mast in Lakeside, and they were hauling to the corner of, I believe it was Cuyamaca and Mission Gorge.

Q. How far in distance would that be?

[Tr. 123] A. About four miles; three and a half, four miles.

Q. And when did that incident occur?

A. That incident occurred just prior to the writing of this letter, which was I would say either the last week in July or the first week in August.

• • • • •

[Tr. 123] Q. (By Mr. Petering) Did Mr. Galvez or any other agent of Teamsters 36 ever tell you why he thought that these various owner-operators were employees?

A. In all my conversations with the Teamsters, Teamster representatives, I have never ever received an answer to my question: How do you figure these people are my employees? And their only response has been, I mean from every B.A. down the line, anyone I've ever talked to, has been, "Well, you signed the Short Form Agreement." And

[Tr. 124] that's been the answer—that's been their patent answer to that question. I really don't know what—I've tried to find out what the determining factor of an employee as far as they're concerned is, and like I said that's the answer I've always received every time I've questioned them on it.

Q. But on more than one occasion, you have in some detail discussed with agents of Teamsters Local 36 the factors which you considered to be indicative of independent contractor status as far as the sub-haulers; is that true?

A. Yes, sir.

• • • • •

[Tr. 124] Q. (By Mr. Petering) Did you have any conversations concerning this same topic of owner-operators as employees versus independent contractors after November 20th, 1978?

A. After November 20th? Yes, sir.

Q. After November?

[Tr. 125] Can you recall the incident exactly?

A. Yes, sir. Again, if my memory serves me correctly, I can't remember what date the incident we had out in the Groves job was, but it was I believe around that time, either just prior or just after that time is when we had a meeting with Bill Kerwin from S. J. Groves, Ed Galvez, and Tony Vallese who was at that time being shown the ropes, more or less—he was just starting out as a business agent—myself and Mike McDonald who is the president and owner of Bicentennial Materials Company—on exactly what the status of the owner-operator would be hauling into the Groves project from a commercial granite pit. And we discussed their status, and on that particular situation they claimed that since I was working for Bicentennial Materials and not for S. J. Groves, I did not see how the Union could come to me and say "Hey, these guys have to go either on the payroll, or they're subject to this," and there were some guys out there that didn't have Union

cards. And at that time yes, we did discuss that. Their status.

Q. And what was the Union's position as to the status of these people at that time?

A. The Union position again was that I was signatory, and that was really all that mattered; and that even though Bicentennial was a non-Union materials supplier, that I [Tr. 126] still had to pay benefits on behalf of the owner-operators, since I was signatory.

• • • • •

[Tr. 130] Q. (By Mr. Bottger) You indicated that you had a number of conversations with representatives of Local 36 at or about the time this August 10 letter—G.C. No. 6, is that correct?—

A. Yes.

JUDGE STEVENS: Did you answer "yes"?

THE WITNESS: Yes. I'm sorry.

Q. (By Mr. Bottger) I'm not altogether clear as to exactly what the Union's position was—they obviously, according to the letter wanted these people to join the Union; is that correct?

A. Yes, sir.

Q. And what were you told would be the consequences if these people—well, were you ever told there was any limit, simply a limitation on the kinds of work they could do, or simply that they couldn't work for you unless they joined the Union?

A. In the conversation with Mr. Galvez on the telephone prior to them sending me this letter, he advised me that the hourly work being done by these people on—it was [Tr. 131] that particular project—but in general, later when our conversation developed, that if they were not members of the Local, that they could not work for me. And, of course, the tonnage situations were exempt from that. But on the hourly work, he was very adamant about

the fact that any hourly work, they had to be members of the Union.

Q. They told you that they couldn't do work for you on any hourly project unless they joined the Union.

A. Right.

Q. Did he make any distinction about job site or non-job site?

A. No, sir he didn't. Just that position was reiterated later in the letter that they sent me on the 10th of August which they told me they were going to send me.

MR. BOTTGER: No further questions.

JUDGE STEVENS: Mr. Prochazka, do you have anything further?

MR. PROCHAZKA: Nothing further, your Honor.

JUDGE STEVENS: All right. Thank you. Excused.

• • • • •

[Tr. 157]

Fred ReCupido, Jr.

was called as a witness by the Respondent and, after having been previously first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Prochazka) During 1978, on the hourly-rated jobs that you were working through Terra Trucking, did you have a difference in rates between a Union job and a non-Union job?

[Tr. 158] A. Yes, sir.

Q. And why was there a difference in rates between the Union job and the non-Union jobs?

A. The difference in rates were—I should say, the difference in rates were to compensate for the fringe benefits; the difference in rates applied to some jobs, in others they

did not. But, depending on what time of the year it was, and what the situations were, there were occasions when there were differences in rates.

Q. And the Union rate, so to speak, was higher than the rate on a non-Union job?

A. Yes.

• • • • •

EXCERPTS FROM THE TESTIMONY OF LARRY W. SHEPARD AT THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE ON AUGUST 27, 1979

[Agency Transcript, pp. 13-17, 20-21, 25, 32, 35, 38-43, 49, 56-57]

Larry W. Shepard

[Tr. 13] was called as a witness by the General Counsel and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Petering) Would you state your full name and address for the record, please?

A. Larry William Shepard, 204 Orleans Avenue, Escondido.

Q. Would you spell your last name.

A. S-h-e-p-a-r-d.

Q. How are you employed, Mr. Shepard?

A. I'm self-employed.

Q. Okay. In what way? Can you explain?

A. All right. I'm an owner-operator. I own my own equipment. I pay all the costs on my equipment. I pay——

Q. What equipment do you own?

A. I own a tractor.

Q. All right. Would you tell me what kind of tractor it is?

A. 1971 International.

Q. Do you own any trailers?

A. No, sir.

Q. Now, when you say you own your own tractor do you in fact own that tractor free and clear?

[Tr. 14] A. No, sir.

Q. Okay.
A. It's financed by a bank.

Q. Okay, what bank is it being financed by?
A. Community Bank in Anaheim, California.

Q. At the present time, can you estimate what percentage of your loan that you took to buy this tractor that's being financed? What percentage is paid off?
A. About 20 percent.

Q. What do you do with this tractor?
A. I haul semi-bottom or bottom dump doubles, and I haul rock, sand, gravel, dirt, things along this line.
A. I'm not sure—I know some of us in this room are not familiar with terminology in the trade. Could you just give us a brief description of what bottom dump doubles are and do.
A. Okay. They are designed so that they dump out the bottom. They are loaded from the top and then when you get to the point where you are going to dump your load instead of raising up like a conventional dump truck, they have gates that open at the bottom and material comes out the bottom. And there's two trailers.

Q. Two trailers——
A. A complete train.

Q. All right. Are these bottom dump doubles designed [Tr. 15] to handle particular products?
A. Basically, yes, they are.

Q. And what kind of products are those?
A. They'd be rock, sand, gravel, earth, some bulk material. We've hauled urea with them, and things that maybe they weren't originally designed for, but they still will work.

Q. I see. Now, how do you operate this truck? Tell me what a typical day will consist of.

A. Well, I have a broker that I contract with which gets the jobs; the contractors will call him for trucks and I'm one of possibly 20 people that work in this area, plus more in other areas.

Q. Who is this broker?
A. Fred ReCupido, Jr. Terra Trucking.

Q. Terra Trucking?
A. That's correct.

Q. You said you have a contract with them?
A. I have a contract that I have signed with him.

Q. Can you tell us, describe briefly what this contract comprises?
A. Okay. I—he procures the work for me—my truck. And in return for that service I pay him five percent of my gross.

Q. What is this contract called?
[Tr. 16] A. What's it called?

Q. Yes. Does it have a name, trade name?
A. I can't recall what it is right now—a Sub-Haul Agreement.

Q. I'd like to show you a document which I have marked for identification as General Counsel's Exhibit 3. Would you review that document for just a second? Is that a true and correct copy of the Sub-Haul Agreement you have with Fred ReCupido and Terra Trucking?

(Pause.)

A. Yes, sir, it is. It's a copy of it.

MR. PETERING: I move at this time that General Counsel's—what's been marked for identification as General Counsel's Exhibit 3 be entered into evidence as General Counsel's Exhibit No. 3.

JUDGE STEVENS: Objection by any counsel?

I notice it doesn't have a termination date filled in on Paragraph 8.

THE WITNESS: It's open-ended.

JUDGE STEVENS: It's open-ended? All right, thank you.

It's admitted without objection.

(The document above referred to was marked General Counsel's Exhibit No. 3 for identification and was received into evidence.)

[Tr. 17] Q. (By Mr. Petering) Again, going to a typical day.

A. Okay——

Q. How do you get a day's work for tomorrow, for instance?

A. I usually call the night before.

Q. You call——

A. I call Terra Trucking.

Q. All right.

A. Or he could call me, depending on what's going on at the time. He will tell me what's available for the next day, and I can either go ahead and take it or refuse it, one or the other; and I usually get alternatives—in other words, different variety jobs if he happens to have that many going for the next day.

And then I confirm, I'm told what time I'm supposed to be there, and I'm told the address to go to. And I take my truck the next morning and I go to whatever address and what time they want me there.

Q. Is this the same address day after day?

A. No, sir.

• • • • •

[Tr. 20] Q. Okay. And you said that you don't own your own trailer. How do you get this material from one place to another?

A. I lease trailers from Terra Trucking.

Q. Just briefly, what does that lease agreement provide?

A. It provides that when I pull his trailers that I pay him 20 percent of my gross for the use of his trailers.

MR. PETERING: I'd like to show you a document that I have marked for identification as General Counsel's [Tr. 21] Exhibit 4.

Would you review that document just briefly?

(Pause.)

Q. (By Mr. Petering) Is that a true copy of the Trailer Rental Agreement you had with Terra Trucking?

A. Yes, it is.

• • • • •

[Tr. 25] Q. (By Mr. Petering) Now, how are you compensated for hauling materials?

A. Well, I'm paid by Fred; that's another part of the agreement where he collects the money that the truck has grossed for the month, and then I'm paid 95 percent of that; and 20 percent also comes out for the trailer rental.

• • • • •

[Tr. 32] Q. Do you get a show-up time or anything?

A. There is a company policy—Terra Trucking's policy, I should say, is he has it set up for two hours show-up time.

• • • • •

[Tr. 34] Q. (By Mr. Petering) Have you ever negotiated a rate higher than the rate that you originally went out to work on?

A. Yes.

Q. When did that happen?

A. Well, there was about five of us that got together about three weeks ago, five of us, five of the drivers, contractors. We have a big problem with fuel right now; fuel

has just escalated really high, and it was a case of where we couldn't afford to take any more of a cut—that price or the established price anymore.

Q. Which was what was the price at that time?

A. I believe it was thirty-six dollars an hour. But the specific job we were talking about was an asphalt job [Tr. 35] we were on; we were hauling that by the ton mile. And it just was a case where it was extremely hard on equipment and it was a big time factor, and there was a lot of ramifications of why we had this meeting. And so we called Fred up and told him that something was going to have to change because we shot him a figure that we thought was fair for the contractor and for us; and Fred went ahead and changed the price at a later time. Now on that specific job, he's locked into that job, but he's flexible on future jobs.

• • • • •

[Tr. 38] Q. Have you ever hauled for any broker other than Fred [Tr. 39] ReCupido?

A. One time, I hauled some freight.

Q. When was that?

A. During the rainy time. I think it was around the first of December.

Q. December of——

A. '78.

Q. First of December of '78.

A. It was either the latter part of November or the first part of December.

Q. And what—how long of a period of time was that that you were hauling freight?

A. Just one day.

Q. That's the only time you have ever hauled for someone other than Fred ReCupido?

A. Right. I'm not bound to haul for him, he just keeps me busy, so—I could haul—my permit allows me to haul

for either as a prime carrier or—that means that I can bill the company direct myself for a hundred percent of the gross—or I can work for a broker, either way. There's no stipulation on what I have to do.

Q. Are you a member of a labor organization?
A. You mean a union?

Q. Yes.
A. No, I'm not now.

[Tr. 40] Q. Were you a member of a labor organization?
A. I was forced to become a member.

Q. The answer is yes, you were?
A. Yes, I was.

Q. What labor organization?
A. Teamsters 36.

Q. And when did you join Teamsters 36?
A. First part of September, '78.

Q. Can you tell me the circumstances under which you became a member of the Teamsters Union No. 36?

A. Well, about August of '78, Terra Trucking got a letter from Local 36—I don't remember who signed the letter, but I seen a copy of it—and it stated that if the people—being that he was signatory to a Short Form Agreement that the people that were sub-hauling for him, if they didn't join the Union he was just going to cease using their services.

Q. All right. And what happened then?

A. Well, Fred called a meeting, and he was under the gun. He didn't have—didn't leave him any choice.

Q. When did this meeting occur?
A. August. It was sometime in August of '78.

Q. What happened at this meeting?

A. He showed us—Fred showed us the copy of the letter and he told us that either we was going to have to join

[Tr. 41] the Union based on the evidence, or what was in that letter, the contents of that letter, or we was going to have to pull the pin on his trailers.

Q. Going to have to what?
A. Well, that means unhook his trailers.

Q. What was—I'm sorry, I missed it completely, the phrase you used.
A. Pull the pin on the trailer.

Q. Pull the pin on the trailer. Okay.
And what did you do then at that meeting?
A. Well, I talked to the National Right to Work Committee which is counsel over there, and I had been in communications with them trying to get somebody to help the owner-operators, the independent contractors, and based on my contact with them, I asked Fred if he could—he gave us till September 1st—and I asked him if I could have till—or if we could get an extension on that till I got a reading from them on what we were going to do; so he told us he'd give us until September.

Q. And did you join the Union?
A. Yes.

Q. And when was that?
A. It was sometime—I think it was the 5th of September, and it was the absolute last day.

Q. All right. What, did you go to the Union Hall that [Tr. 42] day?
A. Yes, sir, I did.

Q. What happened when you went to the Union Hall?
A. Well, I went to the cashier's cage with my checkbook and I talked to the lady that was—I guess she was a cashier or secretary, one or the other—and I asked her if I could speak to a business agent, and I asked for Hugh McDonald—I'd heard that name.

So I asked him—he come up and talked to me—and I asked him, I said, "Why, how can you make me join a union when I'm an independent contractor, I pay my own bills, I'm not an employee of anybody's, how can you make me join a union against my will?" Or make it so—or make the pressure come upon me that if I didn't join, I didn't have—I had to unhook my trailer. It would affect my income. And he told me it was because Fred ReCupido, Jr. was signatory to a Short Form Agreement. I stated to him that the Agreement that he was talking about was arrived at by everybody except the people that was involved, and that was the independent owner-operators. They talked about it, everything else, but everybody else that made that decision without any representation from us—I said "If I'm not represented or if I can't at least say how I feel about it, being's that I'm paying all the bills, I don't see why I should have to join the Union."

[Tr. 43] Q. What did he say, did he reply?

A. He just smiled and shrugged his shoulders.

Q. Did you have to pay an initiation fee?

A. Right. A hundred dollars is what I gave them. Under protest.

Q. I beg your pardon?

A. Under protest. I wrote that on the check.

Q. And did you pay dues?

A. I paid dues up until—I believe it was April, because that's when this started.

Q. April 1979?

A. Yes.

Plus I paid them a hundred—total was $229. I paid them $100 at one time and $129 another time, plus I kept the dues up.

• • • • •

[Tr. 49] Q. Is there particular minimum levels of insurance coverage that you're required to carry?

A. Public Utilities Commission controls that on the minimum, yes, sir.

Q. Are you carrying the minimum or do you carry in excess of that?

A. I carry the minimum.

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CROSS EXAMINATION

[Tr. 56] Q. (By Mr. Prochazka) You talked about where you leave your tractor at the International dealership. Where do you leave your trailers?

A. They're usually hooked to the tractor.

Q. And the International dealership has room for them also?

A. Yes, sir.

Q. Do you carry any insurance on the trailers?

A. Yes, sir.

Q. And who maintains the trailers?

A. With the exception of minor maintenance, which would be like adding wheel bearing grease or lubing them, and small minor repairs around the light area, I do that part. Terra Trucking does the rest of it.

Q. Okay. Do you have one pair of trailers that you pull [Tr. 57] consistently or do you pull different trailers all belonging to Terra Trucking?

A. No. I usually just pull the same set of trailers unless there's a case where maybe mine is in for maintenance and there happens to be a free set, then I will pull that. Normally speaking, I always pull the same set.

Q. Counsel asked you a question about the operation of owner-operators in Los Angeles and in Riverside County. What opportunities have you had to observe how owner-

operators operate in Riverside and Los Angeles County?

A. Say what?

Q. What opportunity have you had firsthand to learn how they operate?

A. In the course of working with them up there on the same job.

Q. You've talked to them and you've heard what they told you about how they do business?

A. Yes, sir.

Q. You've never worked as an owner-operator dispatched by someone in Riverside?

A. No, I never have.

Q. Have you ever worked in L.A. where you were dispatched by a broker or someone in L.A.?

A. No, sir.

MR. PROCHAZKA: No further questions.

EXCERPTS FROM THE TESTIMONY OF DONNA JEAN HERRING AT THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE ON AUGUST 27, 1979

[Agency Transcript, pp. 132-133, 137-140, 143-144, 147-150, 152]

Donna Jean Herring

[Tr. 132] was called as a witness by the General Counsel and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Petering) Please state your name and address for the record, please.

A. My name is Donna Jean Herring, H-e-r-r-i-n-g. 1314 Darby Street, Spring Valley.

Q. Are you employed, Miss Herring?

A. Yes, I am.

Q. By whom?

A. I'm employed at Kissinger Trucking Company.

Q. And what's your position there?

A. I'm the general manager.

Q. And what—how long have you been employed there?

A. Let's see. I've been with Dale Kissinger for four years.

Q. 1975?

A. Well, 1975. I've taken over his business since January of 1977; I went to work for him full time, I've done his business since 1975.

Q. All right. That entire period, have you been general manager?

[Tr. 133] A. No, not until 1977; January of 1977, Kissinger Trucking became a sole proprietorship. A partner went out of the business, and Dale Kissinger solely owns

Kissinger Trucking Company, and then that's when I took it over.

Q. What were you before that point?

A. I was Dale Kissinger's bookkeeper. I worked for the partnership. Then when the partnership split, I became general manager. Dale Kissinger owns Kissinger Trucking Company with an outside interest; he is not active in the company.

Q. But since 1975 up to and including the present time, you are familiar with the operations, business operations of Kissinger Trucking?

A. Yes, sir.

Q. What are the business operations of Kissinger Trucking Company at the present time?

A. Okay. We're truck brokers. We not only own our own trucks, but we also broker trucks, which we're licensed by the Public Utilities Commission to do this. We are bonded, licensed brokers

Q. Do you both broker and—when I say "you," I mean Kissinger Trucking——

A. Right.

• • • • •

[Tr. 137] Q. Now, in addition to this business with the trucks that Kissinger owns, you also broker?

A. Yes, sir.

Q. Explain how that end of the business works.

[Tr. 138] A. Well, for instance, a contractor will call Kissinger Trucking Company and they'll say, "I need four or five trucks for tomorrow" to haul sand, rock, gravel, demolition, trash—whatever commodity that he has from one point to another point—and would like to hire our trucks. Could we supply? So then we supply trucks, how many he wants to him.

Q. And from what source do you get those trucks that you supply?

A. I call independent owner-operators who have a Sub-Haul Agreement with us.

Q. Let me show you a document that I have marked for identification as General Counsel's Exhibit 8—I believe that's next in order, isn't it?——

JUDGE STEVENS: I don't know. Ask the reporter.

Is that the next in order?

THE REPORTER: No. 8 is the next in order.

JUDGE STEVENS: Thank you.

(The document referred to as General Counsel's Exhibit No. 8 was marked for identification.)

Q. (By Mr. Petering) Is General Counsel's Exhibit 8 a copy of your Sub-Hauling Agreement?

A. Yes, sir. Along with our price list; and along with a cover letter to our sub-haulers which we put out.

Q. Well, the General Counsel's Exhibit 8, which is all [Tr. 139] these documents that are stapled together, that's a package that you present to your sub-haulers; is it not?

A. Yes, sir, it is.

Q. And it is attached together like that?

A. Yes.

Q. How many sub-haulers do you have such agreements with?

A. Probably 70—probably a hundred; anywhere from 75 to 100 sub-haulers. Off the top of my head, I couldn't tell you, we've got so many.

Q. Among those 75 to 100, are there a smaller number of regular people that you work with? Or is that pretty much spread out throughout the group?

A. Well, it depends on how many trucks I need at the moment and how many independent owner-operators are available. I'm not the only broker that does this; and

most of the sub-haulers register with every broker in town that they can, and we all have Sub-Haul Agreements with them. If the man isn't working, then he works for me. He may be on a job for somebody else. But there's a lot of them that we work every day; we try and keep busy every day. But we work with a variety of sub-haulers.

Q. Do you know if any of the owner-operators with whom you have Sub-Haul Agreements do not have a Sub-Haul Agreement with somebody else; that sub-haul exclusively for Kissinger Trucking?
[Tr. 140] A. No.

Q. To your knowledge, there are none?
A. To my knowledge, there's not one sub-hauler in town that does that.

Q. But specifically, with Kissinger Trucking; as far as you know there's nobody that you do business with who has an agreement only with you?
A. No.

• • • • •

[Tr. 143] Q. If you tell one of those employees to go to—let me think of some nice place—to Chula Vista, if you tell a truck driver to go to Chula Vista to pick up a load of rock, is he free to say "No, I'm not going to go down and do that today, I want to go up to Escondido and haul sand"?
A. He may be free, but he doesn't usually do that. No, [Tr. 144] he goes to where I tell him to go.

Q. Well, have there been any occasions where Kissinger, one of the four Kissinger employees has refused to go where you've told him to go?
A. No.

Q. Have there been any occasions where you have called up sub-haulers and told them that there was a job at such and such a place and they have declined to go to that place?

A. The only time that that has ever happened is if the man has gotten out on a job and has had—say the contractor tells me that he's going to haul little small rocks, so I send a material trailer out on the job, and when he gets out there there's huge enormous boulders that would damage the gentleman's equipment, then the man will call me from the job site and say, "Donna, I can't handle this material." That would be the only time or the only occasions that I've had that sub-haulers have actually refused.

Q. So, in other words, there's never been an occasion where you've called up the night before and said, "I need you to go out and pick up such and such a load," and the sub-hauler said "No, I'm sorry, I don't want to do that"?

A. No. Only like if he was broke down or—no, they usually go where I ask them to go.

• • • • •

[Tr. 147] Now, you said that you have an agreement with Teamsters Local 36 at the present time.

A. We—Dale Kissinger signed the Master Labor Agreement with Associated General Contractors, yes.

Q. And when did that happen?

A. In April—it was effective April 1st, 1978.

Q. Do you know the circumstances under—how that contract came to be signed?

A. Yes.

Q. Could you tell us, please?

A. In November of 1977, right around the end of November, a large demolition jog came up for bid in San Diego, what was approximately a six-month job, and we had demolition trailers that we could haul it with. So the contractor called us, it was the Penhall Company, and asked us if we could supply eight semi end dumps daily to them for the next six months, and we told them yes, we could.

Q. What did this job entail?

A. Okay. Where and——

Q. Where.

[Tr. 148] A. Okay. The job was a demolition job down on Harbor Drive; and it was concrete and dirt that would have to be hauled to Otay dump which is about 12 or 13 miles.

Q. Is Otay dump a public dump?

A. Well, there are two dumps at Otay. There's one that is a private dump and one that is a public dump. And the material would be hauled there.

And we told him that yes, we could supply the eight trucks to him for six months; it would be no problem at all, that's fine.

So right around the first of December, the job got underway and they started demolishing the concrete that was there, and we went in to haul it. So the first day that we were there, a business agent—I don't know which one it was, for the Teamsters—came by and told one of the truck drivers that he had to leave the job because he was non-Union.

So Jack Hobbs at Penhall Company who had contacted me for this demolition job——

Q. Jack Hobbs—was he an employee of Penhall?

A. Yes.

Q. Was he a superintendent?

A. Yes, as far as I know.

—called me and told me that the Teamsters said that we couldn't work on that job because we were non- [Tr. 149] Union and we were not signatory to the Master Labor Agreement. So I told him that it was a federal job, and I didn't understand why there were federal funds on the job, why couldn't I haul on the job, didn't make any sense to me, we were hauling it from Harbor Drive out to Otay; and he said didn't make any difference, he said, "If you can find a way to let the Teamsters let you be on this job, you've got the job. But one way or the other, I've got to have this

stuff hauled off the job; if you can't perform, then I'll get a Union contractor—Union trucks that can.

So I called—he told me that I would have to get ahold of a gentleman by the name of Bill Burke at AGC, and I didn't know him. So I called him, and I asked Bill Burke why I couldn't haul on the job. He said it was because Penhall was signatory to the Master Labor Agreement and we were not Union, so we couldn't haul on the job.

Q. And thereafter, did——

A. A Union truck——

Q. —Kissinger sign an agreement with——

A. Well, about—this was in December. So we went along and worked as much as we could; and this was the winter-time and it was pretty bad. So come about February, we were told that we couldn't haul on another job, we couldn't haul brush for another contractor. And the [Tr. 150] Teamsters came and told us that we could not haul on this job because we were non-Union.

So Dale Kissinger and I sat down and decided that if we wanted to work that we were going to have to join the Teamsters. So we went then to AGC and met Bill Burke and signed the Master Labor Agreement—Dale Kissinger did.

Q. Was Kissinger—were your sub-haulers removed from that Penhall job?

A. Yes. We were removed from the whole job.

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FURTHER DIRECT EXAMINATION

[Tr. 152] Q. (By Mr. Bottger) I was a little confused about one point in your testimony. You indicated that many of the owner-operators are—in fact, to your understanding, virtually all of them—have multiple Sub-Haul Agreements; they sign up with different brokers?

A. Right.

Q. And if I understood you correctly, you indicated that on many occasions you have called them and asked them to work for you and they'll tell you that they can't, they're already working on another project; is that correct?

A. Uh-huh.

Q. Okay.

JUDGE STEVENS: Answer "yes" or "no," please.

THE WITNESS: Yes.

JUDGE STEVENS: Thank you.

Q. (By Mr. Bottger) You also testified that owner-operators didn't refuse, as far as you know, never refused to take a job unless they were broken down. What did you mean by—what did you understand the term "refuse" to mean?

A. Well, in—He was saying did they ever come out and say "No, I'm not going to work for you"; that's the way I took the question.

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EXCERPTS FROM THE TESTIMONY OF CHARLES W. BURKE AT THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE ON AUGUST 27, 1979

[Agency Transcript, pp. 160-175, 180-183]

Charles W. Burke

[Tr. 160] was called as a witness by the Respondent Employer Associations and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bell) Will you state your full name for the record, please?

A. Charles W. Burke.

JUDGE STEVENS: With an "e" or without?

THE WITNESS: With an "e."

[Tr. 161] JUDGE STEVENS: Thank you.

Q. (By Mr. Bell) Are you employed, Mr. Burke?

A. Yes, I am.

Q. By whom?

A. By the Associated General Contractors of America, San Diego Chapter, Inc.

Q. And what is your position with Associated General Contractors?

A. I'm the Executive Director.

Q. How long have you been the Executive Director?

A. Just over three years.

Q. What are your duties and responsibilities as Executive Director?

A. Essentially, the overall administrative control of the Association and the dealing solely—also, in addition to that with the labor relations aspect of the Association.

Q. Do you have contract negotiation responsibilities?
A. Correct.

Q. Do you have any responsibility for the preparation of management proposals in connection with the negotiation of the Master Labor Agreement?
A. Yes.

Q. How about the coordinating of the negotiating team; do you participate in that at all?
A. Yes.

[Tr. 162] Q. Did you participate in the 1977 negotiations leading to the Master Labor Agreement for the period June 1, 1977 through June 15, 1980?
A. I did.

Q. And in what capacity?
A. As a staff representative for the AGC of San Diego.

Q. Can you tell me the members of the employer negotiating team for that contract?
A. Are you talking about the Teamsters?

Q. Yes, with respect to the Teamsters.
A. Okay. Don Jellison, Mr. Charles Erreca, and Mr. Jack Ekstrand.

Q. Who did Mr. Jellison represent?
A. Companywise?

Q. No. In the association itself.
A. He represented the AGC.

Q. And how about Mr. Erreca?
A. EGCA.

Q. And Mr. Ekstrand?
A. AGC.

Q. Was there anyone from the BCA on that committee?
A. No.

Q. How about Mr. Hubbard; was he on a committee?
A. No.

Q. In determining proposals to be made in the [Tr. 163] negotiations in 1977, can you describe to us the procedure you used in arriving at proposals to be made across the bargaining table?

A. I arrived in San Diego approximately June of 1976, which would have placed us probably a year in advance of the termination of the Collective Bargaining Agreement. At that time, the Association—meaning the AGC—had been meeting in a craft committee breakdown; that committee would get together and talk about the language—section of the contract.

And when I got into town in June and started acting in the capacity of coordinating this effort, I would meet with each one of the craft committees, go through the language of the contract where they felt that there should be a change. That change then would be incorporated into an overall management proposal which we consummated probably sometime, oh, I would say October or November of 1976, a complete AGC proposal; which then, at the conclusion of that, we met with the BCA and the EGCA who are counterparts within the multi-employer unit, and accepted their proposals, put our proposals with theirs, came up with an overall management proposal for submittal to the Union in June of 1977.

Q. And can you describe for us the pattern of negotiation in 1977 with the unions.

[Tr. 164] Q. By pattern, you mean what?

A. Well, the procedures you followed in terms of negotiating the overall agreement.

When negotiations first started, of course, you go through the process of making sure that everyone understands who the spokesman for the associations, for the association was, who the spokes for the unions—meaning the six

trades that we were dealing with—who that chief spokesman is. At the conclusion of that and the ground rules are put to bed as far as how you deal with the press, how you deal with the external forces within the—outside pressure on the negotiations, you then submit a management proposal to labor, and labor then submits labor's proposal to management. At the conclusion of that particular process, each side goes into its first initial caucus to consider the proposal of the other side.

Q. Did you work on any particular aspect of the overall Master Labor Agreement before any other parts of it? In other words, did you handle the general provisions before you got into the specific——

A. Yes. If you'll note in the Master Agreement, there are pages which we will refer to as administrative clauses; those are the white pages. You meet as a unit, —the entire committee meets at that particular time, and negotiates the white pages—portions of it. At most [Tr. 165] instances, we were able to agree on most of the clauses prior to going into the colored pages, which were the craft negotiations.

Q. Okay. Now, when a proposal was made to the management side, did you have any set method for voting and approval any proposals?

A. Yes. Within the multi-employer unit, which consists of AGC, BCA and EGCA, there is a voting ratio; the ratio is based on, number one, the size of the association, and, number two, the number of employees that are employed by the contractors contained within that association. The breakdown that's currently—which is the understanding between the organization—is two for AGC, meaning votes, two for the BCA, one for EGCA.

Q. And all those votes were cast on each proposal made?

A. I would—no, I would say it was consensus. I cannot recall in 1977 where there was one time where the unit vote basis was called to decide an issue.

Q. All right. With respect to the operating engineer—rather, owner-operator provisions of the Master Labor Agreement, were there proposals exchanged in that regard?

A. That's correct.

Q. Was the proposal made by the employer representatives a written proposal?

A. It was.

[Tr. 166] MR. BELL: Your Honor, how shall I mark these exhibits? Shall it be Respondent Employer's first?

JUDGE STEVENS: Yes.

MR. PETERING: Respondent Employer Associations is how we referred to it.

MR. BELL: How about RE-1?

I only have three copies of the documents. I wasn't aware we had so many lawyers.

(The documenter referred to as the Respondent Employer's Exhibit No. 1 was marked for identification.)

Q. (By Mr. Bell) Mr. Burke, I show you what we have had marked for identification as Respondent Employer's No. 1 and ask if you can take a look at that for me, and tell me if that's a copy of the written proposal that was made with respect to the owner-operator provisions of the agreement?

A. That is correct.

Q. What was the employer associations' proposal with respect to the owner-operators for the agreement?

A. To delete the entire owner-operator section of the contract.

Q. And was that proposal accepted by the unions?

A. No, it was not.

Q. Were there negotiations over the owner-operator [Tr. 167] provisions of the agreement?

A. Basically, over management's proposal to delete.

Q. During the course of these negotiations, were there any strike threats made with respect to the owner-operator provisions?

A. Can I go back and—as far as the breakdown into the craft negotiations, when you eliminate and you finish the which pages which would be basically the administrative clauses and you break down then and go into small committee and then you go into each craft—had it's own negotiating team from management and labor; and you negotiate the craft working rules at that time, of which the owner-operator clause was a part of the Teamsters working rules.

As they broke down into the small craft committee, I was in on a part of those particular negotiations. At that time, there was no question in my mind that the subject of deletion of the owner-operator clauses from the Teamsters special craft working rules was a strike issue.

A. The language which is presently in the agreement, that Section 42, subparagraph B, are you familiar with that language?

A. Yes.

Q. Was any of that language proposed by the employers during that negotiation?

A. No.

[Tr. 168] Q. Why were the employers opposed to the inclusion of the owner-operator provisions of the '77 agreement?

A. For one thing, the language of the '77, the '74 to '77 agreement, as far as the employers were concerned, went too far. Initially, what we were talking about was the area of off-site work. As far as the employers were concerned, the subject that we were negotiating was a job site agreement, a single job site agreement; had nothing to do with the extension beyond the scope of the job site agreement. The employers felt at that particular time that to include

off-site work as far as the Collective Bargaining Agreement was wrong, and therefore attempted to delete that from the agreement.

Q. Did the employer representatives take any position with respect to the inclusion of owner-operators on the payrolls of employers?

A. That was a part of the employers' overall approach to the owner-operator clause by deleting it in its proposal.

Q. Why was that proposed; the deletion of the inclusion of owner-operators on the payroll of the employer?

A. Number one, the contractor—contractors in general feel that the owner-operator has always been a private entrepreneur, a private person—call him a subcontractor if you want to, as far as work in the construction [Tr. 169] industry. That was the basic premise of the deletion as far as the management team was concerned, that he was a private person, was not an employee—unfortunately, rulings prior to that time had dictated that he be an employee, but the management team and AGC still felt that this individual was a private entrepreneur and should not be an employee or on the contractor's payroll. It was working on an hourly basis in most instances, and therefore as far as an hourly basis of his truck operated and maintained, and that basis only; not as an employee.

Q. I gather the Union disagreed with this position?

A. Absolutely, absolutely.

Q. Did the Union insist to the point of work stoppage on the inclusion of the language of 42B?

A. No. I would say that they insisted to the point of a strike issue.

Q. Prior to your coming to the AGC in San Diego, what did you do, Mr. Burke?

A. Just prior to my coming to San Diego, I was a partner in Mendel, Burke & Associates, which was a legislative

and labor relations consulting firm, with offices in Los Angeles and Sacramento.

Q. And what did you do with that group?

A. Primarily, I handled all of the labor relations aspects of Mendel, Burke.

[Tr. 170] Q. And prior to that, what did you do?

A. I was the statewide labor relations director for the Engineering Grading Contractors Association.

Q. And how long did you hold that position?

A. From 1964 until 1974.

Q. And what did that position entail?

A. The conduct and the prosecution of all labor relations activities for the Association, including the negotiations, the preparations of submittals to labor and the handling of arbitrations in grievances throughout the State of California.

Q. Did you participate in negotiations throughout the State of California?

A. Northern California, 46 counties, 11 southern counties and also in San Diego.

Q. And did you do this throughout this ten-year period?

A. Yes.

Q. During the course of your employment with the EGCA, during this ten-year period, did you have occasion to negotiate with respect to owner-operator provisions statewide?

A. Yes. The first shot that I had at it was in 1965 in Los Angeles with the Operating Engineers.

Q. Who initiated that proposal at that time?

A. The Operating Engineers.

[Tr. 171] Q. Was that with respect to the inclusion of owner-operator language in the Los Angeles agreement?

A. That is correct.

Q. And how did that finally resolve itself?

A. A 30-day strike ensued with the end result being that the owner-operator clause was not included into that agreement at that time.

Q. When was the next time that the issue of the owner-operator arose in California?

A. 1969 was the next time I ran into it; it was again with the Operating Engineers in Southern California.

Q. In Southern California?

A. That's correct.

Q. Was it in Los Angeles?

A. That is correct.

Q. And did that issue arise?

A. It resulted in a 40-day strike with one of the main issues being the owner-operator and its insertion into the contract, and it was put into the contract, in the basic form that you find it today with some evolution to a more restrictive clause.

Q. Back in 1965, do you recall what type of proposal was initiated with respect to the owner-operator?

A. It was the first shot that we had at the—on the payroll, and as an employee with a number of days free [Tr. 172] grace in the beginning before you had to put this individual on the payroll.

Q. In other words, an individual could work at a job site for X days without having to become an employee, and that after the passage of so many days that individual would be required to become an employee?

A. Correct.

Q. And how did that evolve, if at all, from 1965 to 1969 in Los Angeles?

A. Well, of course, the initial input from the operating engineer at that time for his owner-operator clause was in 1969 we put language into the contract after a 40-day

strike that stated that the owner-operator would go on the contractor's payroll after five accumulative days of working for the employer in the industry.

Q. Now, 1969, was this an Operating Engineers proposal?

A. That's correct.

Q. Had there been any Teamster proposal at that time?

A. Not at that time.

Q. How about prior, in 1965?

A. None that I can recall.

Q. When was the next time that the owner-operator issue came up?

A. In 1970 in Southern California with the Teamsters.

Q. And who initiated the issue at that point?

[Tr. 173] A. The Teamsters.

Q. And can you recall what the Teamster demand was at that point?

A. The demand at that particular time was—again, the employee operating—the owner-operator on the payroll as an employee after that time frame. It probably in that particular point was maybe three or four days that you had space in between there before he went on the payroll as an employee.

Q. So then the Teamsters' proposal was then similar to the initial proposals made by operating engineers?

A. That's correct. That's correct.

Q. And what resulted from that proposal?

A. If my memory serves me correctly, sometime in October of 1970 there was a short strike of about four days. Then it evolved back into the 1971, I think we had a moratorium on the issue until 1971 where we entered into the negotiations again. There was a brief strike in 1971, in August of '71, and then in November of '71 there was a 30-day strike on the issue where the language went into

the agreement of payroll status for an owner-operator employee after the second day.

Q. And these were strikes brought about by the Teamsters?

A. That's correct.

[Tr. 174] Q. And these strikes were over the very issue of owner-operators?

A. This was a—and I'll use the term of a "blood item" with the Teamsters at that particular time. Without an owner-operator clause within his contract that controlled the owner-operator—and this is the thinking, this is what we saw as management at that particular time—that the Teamsters involved in the construction industry would be null and void after that point.

(Pause.)

Q. And as far as you know, has some language with respect to owner-operator been included in the Master Labor Agreements in all three areas of California since that time, 1971?

A. As far as the Teamsters are concerned, about the same time. '71 was the key issue in Southern California and in Northern California. To the best of my recollection it was delayed in Southern California, in San Diego, until everyone had a chance to see what was going to happen with the similar language in Southern California and in Northern California.

Q. Similar demands were ultimately made in San Diego?

A. Approximately 1972. About 1971, language was discussed, held in abeyance until—and I think incorporated into the Collective Bargaining Agreements [Tr. 175] around 1972, '73, '74, somewhere around in there.

The question of implementation, of course, comes in at that time; and then I lose track of it after that, because I was not involved in the negotiations down here.

Q. During the time that you held the position with the EGCA and were involved in statewide negotiations, did you ever have occasion to talk with any representatives of the Teamsters as to why they were so adamant about the matter of owner-operators?

A. The question of owner-operator—many times, to your question, yes. The basic problem with the owner-operator clauses with the Teamsters was that had they not taken a step somewhere along the line to control the issue of the owner-operator, every member within the Teamsters would suddenly become a private entrepreneur, go out and buy himself a truck, become an owner-operator working in the industry, and the Teamsters would have no members. And that was the chief issue and the chief reason why the Teamsters in 1971, '72 and earlier made their big push for the owner-operator clauses.

Q. And they saw this treat as an erosion of the bargaining——

A. No question about it.

• • • • •

[Tr. 180] Q. (By Mr. Petering) Mr. Burke, at this time I'm going to place a document in front of you which I have now marked for identification as General Counsel's Exhibit 9. Let me show you another one which is slightly different and it has a little seal on the front.

A. Right.

Q. This says "Master Labor Agreement for San Diego County," covering construction work by carpenters, cement masons, laborers, Teamsters, pipefitters, effective June 16, 1977 through June 15, 1980. Do you see that?

A. Yes.

Q. Now this is, in fact, the agreement that came out of negotiations which you have just been discussing?

A. That is correct.

Q. And the provisions in Section 42, which is the Teamsters Working Rules, are the provisions that were eventually negotiated——

A. That is correct.

Q. —and AGC signed. All right.

Now, Respondent Union has placed into evidence, I believe their Exhibit No. 6, which is an amendment.

[Tr. 181] JUDGE STEVENS: There may be a copy here. Do you want a copy of it? Here's a copy of it.

MR. PROCHAZKA: Well, there are two record copies.

MR. PETERING: I do have a copy, but it's attached to something else at the present time.

MR. PROCHAZKA: The reporter has two copies.

MR. PETERING: I wanted to show the witness——

JUDGE STEVENS: You can show him this one, unless you need the attachment.

MR. PROCHAZKA: The reporter has two copies. Just take one of the reporter's copies.

(Pause.)

Q. (By Mr. Petering) Respondent Union's Exhibit 6, which is a document, it has "Purpose" at the top, but then it has "Amendment" toward the bottom of the page—how did those amendments come about, to your knowledge?

A. This was on a suggestion from the crafts involved in the Master Labor Agreement, namely the carpenters, cement masons, laborers, Teamsters and pipefitters, and made this proposal to amend the current Collective Bargaining Agreement and the relative clauses here, and was submitted to management through our counsel, Mr. Bell, at which time we took it under advisement.

Q. And the date November 20th, 1978, which appears on the last page is the date—what does that date signify, [Tr. 182] to your knowledge?

A. The date that the document was signed by the parties involved.

Q. On that date what status did those amendments have?
A. Well, when they were signed they were enforceable under the terms of the agreement.

Q. Were those amendments ever incorporated——
A. No.

Q. —in any way into the General Counsel's Exhibit 9?
A. This agreement was printed in 1977.

Q. Was there an addendum published—my question, let me skip ahead—how would anybody out in the field know that Section 4-6 has been modified or that 37 or 15 or any of the other clauses that are purported to be modified by the amendment have, in fact, been modified?
A. They wouldn't.

Q. Is there any such plan, to your knowledge?
A. Whenever the issue of, as far as—you've got to understand that at the time this document was signed, the question of the Biddle-Carter case was still up in the air. We signed this in an attempt to rectify the wrongs that were alleged to be wrongs in the Collective Bargaining Agreement in order to resolve the issue at hand under the Biddle-Carter case with the NLRB or with whoever else was involved in the dispute.

[Tr. 183] When this document was signed, the Biddle-Carter case was still not resolved as far as we were concerned, and although we may have felt that the document itself was enforceable at the time, we were not sure; we did not know where to go with the particular cases, with Biddle-Carter. And so the issue was up in the air and as far as we were concerned to some degree is still up in the air.

• • • • •

STIPULATION OF COUNSEL AT THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE ON AUGUST 27, 1979

[Agency Transcript, pp. 185-187]

[Tr. 185] MR. BELL: At this time, I would like to read into the record the following proposed stipulation: The Teamsters initially proposed the inclusion of the owner-operator language in the May 1, 1965 Master Labor Agreement. The language was expanded at the Union's insistence in the 1972 Master Labor Agreement, and again in the 1974 Master Labor Agreement. The inclusion of the owner-operator language in each agreement was opposed by the employers, but was included at the Union's insistence, and as a result of economic pressure brought by the Unions against the employers.

In addition, I would like to propose the admission of Respondent Employer's Exhibits 2, 3 and 4, which are the relevant portions of the Master Labor Agreements concerning owner-operators for the 1965-1970 Master Labor Agreement [Tr. 186] which was amended through April 30, 1972, the May 1, 1972 through June 15, 1974 Master Labor Agreement, and the June 16, 1974 through June 15, 1977 Master Labor Agreement.

Each exhibit consists of a picture of the front page of the Master Labor Agreement identifying the document, and all of the clauses concerning owner-operators with respect to the Teamsters in each of those agreements.

JUDGE STEVENS: And was there another part of that proposal, for the stipulation?

MR. PROCHAZKA: He read the stipulation first.

JUDGE STEVENS: Yes. But is that the end of the stipulation?

MR. BELL: Yes, that would be the end of it.

JUDGE STEVENS: All right. It's been proposed. Do any of the counsel have any objection? Do you all agree to it?

MR. PROCHAZKA: I have no objection. I have not seen the exhibits, but I have no objection to the stipulation as proposed.

JUDGE STEVENS: All right. I think possibly all counsel should have an opportunity to look at these documents before they go in by way of stipulation.

We'll go off the record.

(Off the record discussion was held.)

JUDGE STEVENS: Back on the record.

[Tr. 187] It's my understanding that counsel have all had an opportunity to now review these proposed exhibits. The stipulation has been proposed; is it accepted by all parties?

MR. PETERING: General Counsel joins in the stipulation, and has no objection to the entry of Respondent's Exhibits 2 through 4, inclusive.

JUDGE STEVENS: Fine.

MR. PROCHAZKA: Respondent Local 36 has no objection.

MR. GORE: Charging Party Larry Shepard has no objection.

JUDGE STEVENS: Fine.

MR. BOTTGER: Charging Party California Dump Truck Owners joins in the stipulation.

JUDGE STEVENS: Thank you. I appreciate that cooperation because it does speed things along. The stipulation is accepted and entered.

JUDGMENT OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before McGowan, Senior Circuit Judge; Robb, Circuit Judge; and Jameson*, Senior District Judge, United States District Court for the District of Montana

The above consolidated causes came on to be heard upon the petitions of Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, California Dump Truck Owners Association and Larry Shepard, to review an order of the National Labor Relations Board issued on May 8, 1980, against petitioner in 80-1503, and upon cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 7, 1981, and has considered the briefs and transcript of record filed in this cause. On December 4, 1981, the Court issued an order granting enforcement of the Board's order and denying the petitions for review. In conformity therewith, it is hereby,

ORDERED AND ADJUDGED by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, etc., its officers, agents, and representatives abide by and perform the directions of the Board in said order contained.

/s/ Carl McGowan
Senior Circuit Judge,
United States Court of Appeals
for the District of Columbia Circuit

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

/s/ *Illegible* Robb
Circuit Judge,
United States Court of Appeals
for the District of Columbia Circuit

/s/ William J. Jameson
Senior Judge,
United States District Court
for the District of Montana

ORDER OF THE SUPREME COURT GRANTING THE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 81-1627

LARRY SHEPARD, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, et al.

Order Allowing Certiorari. Filed May 17, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Opposition

1

Supreme Court, U.S.
FILED
APR 16
ALEXANDER L. STEVAS

No. 81-1627

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SHEPARD, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its broad discretion to frame appropriate remedies when it declined to order reimbursement of sums paid by self-employed persons pursuant to an agreement that violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), where there was no evidence of specific union coercion of such persons.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1627

LARRY SHEPARD, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. 15a-44a) are reported at 249 N.L.R.B. 386.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1981. The petition for a writ of certiorari was filed on March 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are set forth in the petition (Pet. 2-3), except that subsection (A) of Section 8(b)(4)(ii) (29 U.S.C. 158(b)(4)(ii)(A)) provides in pertinent part that it

shall be an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in an industry affecting commerce, where in either case an object thereof is:
>
> > (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by [Section 8(e)].

STATEMENT

1. The 1977-1980 Master Labor Agreement (MLA) between the Union[1] and three Contractors Associations[2] included provisions that required owner-operators of dump trucks transporting materials to or from, or on, the job site to become "employees" of the signatory contractors and be subject to all the terms and conditions of the MLA, including the union membership provisions (Pet. App. 22a-25a).[3] In January 1979, upon charges filed by petitioner Shepard (an owner-operator of a dump truck) and the California Dump Truck Owners Association, the Board's General Counsel issued an unfair labor practice complaint alleging that the owner-operator provisions of the MLA violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), by providing that the Contractors Associations'

---

[1]Building Material and Dump Truck Drivers, Teamsters Local No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2]Associated General Contractors of America, San Diego Chapter, Inc.; San Diego Building Contractors Association; Engineering and General Contractors Association.

[3]The practice in the industry is for contractors to hire owner-operators of dump trucks on a day-to-day or task basis through brokers, who refer owner-operators to jobs for a five percent fee (Pet. App. 30a-31a).

members cease, or refrain from, doing business with non-union self-employed owner-operators (Pet. App. 19a-20a). The complaint did not allege, however, that the Union had violated Section 8(b)(4)(ii)(A) of the Act, 29 U.S.C. 158(b)(4)(ii)(A), by threatening or coercing the owner-operators to join the Union (*id.* at 13a).

The Board, finding that the owner-operators were independent contractors rather than employees,[4] concluded that the Union and the Contractors Associations violated Section 8(e) "[b]y entering into and maintaining" the disputed provisions of the MLA (Pet. App. 15a-16a, 44a). The Board ordered the Union and the Contractors Associations to cease and desist from "maintaining, giving effect to, or enforcing" the unlawful provisions of the MLA (Pet. App. 17a, 18a).[5]

However, the Board declined to adopt the recommendation of the Administrative Law Judge that the Union and the Contractors Associations be jointly and severally liable to all owner-operators of dump trucks who joined the Union for the amount of their initiation fees, assessments, and contributions to employee benefit funds, without regard to whether the Union or the Associations engaged in coercive conduct to cause them to join the Union (Pet. App. 16a-17a n.2, 43a). The Board explained that "a reimbursement order, typically used to 'make whole' *employees* for violations of the Act, [is] generally overbroad and inappropriate in the context of 8(e) violations," and it noted

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[4]The Board followed its decision in *Associated General Contractors of California, Inc.*, 239 N.L.R.B. 686 (1978), where, after the decision of the Ninth Circuit in *Associated General Contractors* v. *NLRB*, 564 F. 2d 271 (1977), it had reversed its earlier ruling that the owner-operators were "employees" under the Act (see Pet. App. 21a-22a).

[5]No issue concerning the Board's unfair labor practice findings or its cease and desist order is raised here.

"that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act" (Pet. App. 17a n.2; emphasis in original). Citing *Carpenters Local 60* v. *NLRB*, 365 U.S. 651 (1961), the Board also found "insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by [the Union and Contractors Associations]" to warrant the recommended reimbursement order (*ibid.*).[6] For these reasons, the Board concluded that the reimbursement of owner-operators proposed by the ALJ "would not effectuate the remedial purposes of the Act" (Pet. App. 17a n.2).

2. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 14a). Noting that "[t]he Board's remedial power 'is a broad discretionary one, subject to limited judicial review,' " the court declined "to disturb the Board's exercise of discretion" in refusing to provide a reimbursement remedy for the dump truck drivers (Pet. App. 12a, quoting *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)).

ARGUMENT

Section 10(c) of the Act, 29 U.S.C. 160(c), "charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344

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[6]The record shows only one owner-operator, petitioner Shepard, who definitely joined the Union pursuant to the unlawful contractual provisions in the MLA. Shepard had a subhaul agreement with broker Terra Trucking Company, a signatory to the MLA. In August 1978, Terra received a letter from the Union requesting that seven owner-operators working through Terra, including Shepard, be required to join the Union, pursuant to Terra's earlier signing of the MLA (Pet. App. 28a-29a). Although the president of Terra informed the seven that they would have to join the Union if they wished to continue to use his services (Tr. 89), he later discovered "that some of them did not" (Tr. 90). Shepard, however, joined the Union under protest (Pet. App. 29a-30a).

U.S. 344, 346 (1953). As the court of appeals correctly noted, the Board's remedial power "is a broad discretionary one, subject to limited judicial review." Pet. App. 12a, quoting *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 216. In fashioning its remedies, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). The Board's denial of a reimbursement remedy here was well within its discretion to frame appropriate remedies and raises no issue warranting review by this Court.

This Court's decision in *Carpenters Local 60* v. *NLRB*, 365 U.S. 651 (1961), establishes that the Board acted well within its ambit of discretion in declining to order reimbursement. In *Carpenters Local 60*, the Board found that the union had maintained and enforced an unlawful closed shop agreement. As a remedy, the Board ordered refunds of dues and fees paid by all employees under the illegal agreement, even though there was no evidence that any of the employees actually had been coerced into joining the union. This Court disapproved the reimbursement remedy, notwithstanding the union's maintaining and enforcing of an illegal closed shop agreement. The Court held that such a remedy was improper in the absence of evidence of specific coercion to join the union.

Similarly here, the mere existence of an agreement violative of Section 8(e) does not establish that individual owner-operators who became members of the Union were coerced into doing so. There was, for example, no allegation by the General Counsel and no finding by the Board that the Union had violated Section 8(b)(4)(ii)(A) by utilizing threats or coercion against owner-operators to force them to join the Union. Indeed, because there is evidence that the Union complained about lack of membership on the part of

only seven drivers (see note 6, *supra*), the natural inference from the record is that the vast majority of the several hundred owner-operators[7] already were members of the Union. Many, perhaps all, of these owner-operators may have joined the Union voluntarily in order to obtain the benefits of union-sponsored benefit plans or because they were desirous of being represented by the Union. Compare *Carpenters Local 60* v. *NLRB, supra,* 365 U.S. at 659 (Harlan, J., concurring).

Although petitioner Shepard and perhaps several other Terra subhaulers did join the Union in order to receive work from Terra, they did so at Terra's behest. Therefore, the only evidence of possible coercion here is that applied by one employer, Terra, to an independent contractor. The Board, however, has never ordered reimbursement by an employer to an independent contractor or other business. See, *e.g., Local 814, International Brotherhood of Teamsters (Santini Bros., Inc.)*, 208 N.L.R.B. 184, 201-202 (1974), enforced, 546 F. 2d 989 (D.C. Cir. 1976), cert. denied, 434 U.S. 818 (1977); *Highway Truckdrivers & Helpers Local 107*, 199 N.L.R.B. 531 (1972), on remand from 383 F. 2d 772 (3d Cir. 1967), cert. denied, 390 U.S. 905 (1968). This practice is consistent with the terms of Sections 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), which expressly prohibit an employer from coercing *employees*; they do not, in terms, speak to employer coercion directed at independent contractors. Moreover, absent evidence of specific Union coercion, the Board could well conclude that the Union's involvement was too remote to warrant imposing a

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[7]Terra had subhaul agreements with about 200 to 250 owner-operators, and regularly brokered for 25 to 30 (Pet. App. 27a). Another broker, Kissinger Trucking Company, had subhaul agreements with between 75 and 100 owner-operators (*id.* at 26a).

reimbursement obligation on the Union. Cf. *Local 814, Teamsters (Santini Bros., Inc.)*, *supra*, 208 N.L.R.B. at 201 (union reimbursement ordered where there was a showing of specific union coercion, violative of Section 8(b)(4)).

In these circumstances, and because union members receive benefits as well as burdens as a result of their membership, the Board reasonably could conclude in this case that a requirement that the Union reimburse owner-operators for the amount of their initiation fees, assessments, and employee benefit contributions would be "overbroad and inappropriate" (Pet. App. 17a n.2). In addition, the Board's election not to order a reimbursement remedy for a bare violation of Section 8(e) is consistent with Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. 187, which provides a private cause of action for damages for secondary agreements violative of Section 8(e) only where coercion, violative of Section 8(b)(4), has been utilized to enforce those agreements. See *Connell Construction Co.* v. *Plumbers & Steamfitters Local*, 421 U.S. 616, 635 n.16 (1975); *id.* at 649 n.9 (Stewart, J., dissenting); see also Pet. 13-14.[8]

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[8]Contrary to petitioner's assertion (Pet. 10-11), the Ninth Circuit's decision in *Joint Council of Teamsters, No. 42* v. *NLRB*, 671 F. 2d 305 (1981) (Pet. App. 45a-54a), does not present a conflict among the circuits that would warrant granting the present petition. In that case, unlike here, a violation of Section 8(b)(4)(ii)(A) was alleged and proven as to one broker and owner-operator. See 248 N.L.R.B. 808, 817 (1980). Moreover, although the Ninth Circuit disagreed with the reasons the Board had given for declining to order a make-whole remedy for a bare violation of Section 8(e)—presumably with respect to the independent contractors for whom the Board did not find a violation of Section 8(b)(4)(ii)(A)—the court remanded the case to the Board "to fashion a make-whole remedy *or to show good cause why a make-whole remedy would not effectuate the purposes of the Act*" (Pet. App. 54a; emphasis supplied, footnote omitted). The Ninth Circuit thus has not finally decided whether the Board is required to provide a make-whole remedy in such a situation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1982

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Opposition

2

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No. 81-1627
IN THE

Supreme Court of the United States

October Term, 1981

LARRY SHEPARD,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION; *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

California Dump Truck Owners Association's Response to the Petition for a Writ of Certiorari.

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QUESTIONS PRESENTED FOR REVIEW.

California Dump Truck Owners Association submits that the questions presented on the instant Petition are more correctly cast as follows:

1. The National Labor Relations Board and the Court below agreed that the record shows violations of the "hot cargo" provisions of Section 8(e) of the National Labor Relations Act, because the Union and contractor members of the Associations agreed that the contractors would cease doing business with independent dump truck owner-operators, and they enforced this agreement, with the result that independent owner-operators were unlawfully forced to join and make payments to the Union. Yet the Board overruled its Administrative Law Judge on the proper remedy, summarily refused to order reimbursement of these illegally coerced payments, and allowed the Union to profit from its and the contractors' unfair labor practices. The Court below allowed this Order to stand.

Can such a remedy decision effectuate the policies of the Act?

2. The Board and the Federal Courts have consistently and properly ordered reimbursement for unfair labor practices compelling their victims to make payments to another, in varying circumstances, including "hot cargo" cases. Yet the Board refused to apply its own policy here, apparently because the coercion demonstrated in the record arose in the context of a Section 8(e) "hot cargo" case.

Does the Board have discretion to treat the independent owner-operators differently than it has treated other similarly situated victims of unfair labor practices?

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No. 81-1627

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION; *et al.*,

Respondents.

California Dump Truck Owners Association's Response to the Petition for a Writ of Certiorari.

Respondent California Dump Truck Owners Association ("CDTOA") prays that the Writ of Certiorari petitioned for, if issued by this Court, be issued to review the entire single judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on February 3, 1982, which failed to require the National Labor Relations Board to provide a meaningful remedy to those aggrieved by the unfair labor practices adjudicated in these proceedings.

STATEMENT OF THE CASE.

The judgment from which a writ of certiorari is sought in this proceeding encompasses three petitions to review a single Decision and Order of the National Labor Relations

Board ("NLRB"), issued on May 8, 1980, and the Board's cross-petition for enforcement of that Order.

These proceedings began on December 19, 1977, when CDTOA, an unincorporated association of independent owner-operators of dump trucks in California, filed a charge with the NLRB alleging that Building Material and Dump Truck Drivers, Teamsters Local Union Number 36, etc. (the "Union"), and three associations of employers who are contractors in the building and construction industry in San Diego County, California (the "Associations") had violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), by agreeing to cease and ceasing to do business with the owner-operators. On October 20, 1978, Larry Shepard, an individual dump truck owner-operator, filed a similar charge against the Union.

The two charges were consolidated by the NLRB. After trial, the Board's Administrative Law Judge found that the Union and Associations had violated Section 8(e), and recommended a narrow cease-and-desist order with notice posting, accompanied by an order that the Union and Associations reimburse the victimized owner-operators for their enforced payments to the Union of dues, initiation fees, assessments and contributions to Union benefit funds. On review, the NLRB affirmed the rulings, findings and conclusions of its administrative law judge (with one immaterial exception), adopted his recommended order in most respects, but expressly deleted the proposed make-whole reimbursement order.

Three petitions to review the Board's Decision and Order were brought before the Court below. The Union petitioned to review the Board's determination that unfair labor practices had been committed, *Building Material and Dump Truck Drivers, Teamsters Local Union Number 36, etc. v. National Labor Relations Board* (D.C. Cir. Case No. 80-

1503), and the Board cross-petitioned for enforcement. CDTOA petitioned to review the inadequate remedy provided by the Board for the violation that it found, *California Dump Truck Owners Association v. NLRB* (D.C. Cir. Case No. 80-1807), as did Petitioner Larry Shepard. *Shepard v. NLRB* (D.C. Cir. Case No. 80-1808). CDTOA was a party in all three cases.

On July 24, 1980, the Court below consolidated the various petitions into one proceeding. By a single opinion filed on December 4, 1981, and a single judgment entered on February 3, 1982, that Court denied all petitions for review and enforced the Board's order in full.

STATEMENT OF POSITION.

CDTOA (and its members) and Petitioner Shepard are all aggrieved by the NLRB's refusal to provide an adequate remedy for the unfair labor practices it found in these proceedings, and by the judgment of the Court below, which allowed that Order to stand. Accordingly, CDTOA fully supports Petitioner Shepard's arguments that the judgment to be reviewed is fundamentally erroneous in that respect. If the judgment is to be reviewed by this Court, however, there can be no sense in limiting the review to the single judgment's impact on Mr. Shepard alone, to the exclusion of other victims of these specific unfair labor practices demonstrated on the record.

CDTOA seeks precisely the same make-whole remedy which Petitioner Shepard has requested from this Court, for essentially the same reasons. Because CDTOA does not seek to change the judgment below, or any part thereof, in any way differently than Petitioner Shepard, a cross-petition by CDTOA in this matter would be inappropriate. However, although CDTOA is nominally a Respondent to Mr. Shepard's Petition, pursuant to this Court's Rule 19.6, it

is in fact aligned with Petitioner Shepard as a Petitioner on the issues presented for review.

Under normal circumstances, CDTOA would presume that the instant Petition, if granted, would fully present for review the important remedial error committed by the Board and enforced by the Court of Appeals. Because Mr. Shepard's Petition in this Court uses (incorrectly) the identical caption used on his Petition for Review by the Court below, and because his Statement of the Case to this Court is understandably written from his particular perspective, CDTOA wishes to emphasize that if the issues presented in the Petition are reviewed by this Court, in the interests of justice that review should encompass the implication of those issues on the entire judgment which is before the Court.

REASONS SUBMITTED IN SUPPORT OF THE PETITION.

CDTOA will not burden this Court with a restatement of the numerous arguments Mr. Shepard advances in support of his Petition. Several points, however, may assist the Court in reaching a disposition on the Petition.

First, as the Petitioner has stated, on December 21, 1981, the United States Court of Appeals for the Ninth Circuit issued its decision in *Joint Council of Teamsters, Number 42 v. NLRB* (and consolidated cases), ... F.2d ..., 109 BNA Lab. Rel. Rep. 2181, 92 CCH Lab. Cas. ¶ 13,178, 109 LRRM 2181 (9th Cir. 1981). That case arose out of CDTOA's charge before the NLRB that unions and contractor associations in the Southern California region (which immediately adjoins the San Diego area involved in the instant proceeding) had committed the same unfair labor practice charged in this proceeding. Just as in this case, the NLRB found that the Act had been violated; the record

before the Board demonstrated that the "hot cargo" agreement was enforced with the effect of forcing independent owner-operators either to forego their livelihood, or to join the unions; and, in language virtually identical to that which it used to explain its decision here, the Board again summarily refused CDTOA's request for a remedy that would make the victims of unfair labor practices whole and redress the consequences of the violations.

CDTOA petitioned for review of the Board's remedy decision in the Southern California proceeding. Upon careful review, the Ninth Circuit agreed that CDTOA's petition was meritorious, and remanded the proceeding to the NLRB with instructions either to grant a make-whole remedy or to show cause why such would not effectuate the purposes of the Act. This Court is thus presented with a square conflict in the Circuits which cannot be reconciled by attempted distinctions between the essentially similar facts of the two cases. As a result, the Southern California unfair labor practices will be meaningful redressed, while the similarly victimized owner-operators in the immediately adjacent county will receive no effective relief at all. Needless to say, guidance applicable to the rest of the nation is entirely unavailable.

Nor is the question a matter of small importance. Although "hot cargo" cases often arise in the construction industry, the anti-boycott protections of Section 8(e) cover the spectrum of American industry. But as the facts of this case demonstrate, it is relatively simple to circumvent the policy of Section 8(e) simply by entering into a labor management contract declared invalid by the Section. The affected unions can then enlist the relevant employers to do the "dirty work" of directly forcing independent businessmen to capitulate to the results the unions desire. If the NLRB is free to ignore coercive unlawful effects it has

found in a case like this, and to refuse a meaningful remedy for those consequences, this case will be a clear signal that there is no effective sanction for such blatant violations of the federal labor policy. Employers will have no reason not to accede to unlawful demands at the bargaining table, or to refuse requests that they enforce unlawful contract terms on third parties. And the unions will have every reason to continue to circumvent the protections of Section 8(e), because they will get to keep all the money they can wrongfully extract from businessmen like the dump truck owner-operators, even if they are ultimately told to stop the precise practices in question.

This case presents a good example of exactly that problem. The record of this proceeding, and numerous other cases before the NLRB and the Circuit Courts, reflect that in California alone a battle has been waged between the independent dump truck owner-operators and the Teamsters unions, up and down the length of the state for over a decade. *See, e.g. Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971); *Contractor Members of the Associated General Contractors of California, Inc. (A.R. Kramer)*, 201 NLRB 311 (1973), *vacated, Associated General Contractors of California, Inc.*, 239 NLRB 686 (1978); *Contractor Members of the Associated General Contractors of California, Inc. (A.R. Kramer)*, 209 NLRB 363 (1974); *Contractor Members of the Associated General Contractors of California, Inc. (Neal Hecher)*, 209 NLRB 366 (1974); *Associated General Contractors of California, Inc.*, 220 NLRB 540 (1975), *enforcement denied in next case cited; Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977); *Associated General Contractors of California, Inc.*, 239 NLRB 686 (1978); and the NLRB decisions underlying the

instant proceeding and the substantially similar Ninth Circuit case.

Throughout this period, the various Teamsters unions in California have repeatedly attempted, by one means or another, to treat the owner-operators as employees and force them to become members of the unions. Finally, in *Associated General Contractors of California, Inc. v. NLRB, supra*, 564 F.2d 271, the Ninth Circuit definitively held that the owner-operators were not employees, and could not be treated as such.

Nonetheless, the Union and Associations continued to enforce contract provisions which improperly treated the independent owner-operators as employees, required them either to join the Union and pay fees and dues or be denied work, and required the Association employers to make contributions to Union benefit plans on their behalf. The NLRB's Administrative Law Judge, and the Board itself, found that the Union and Associations have attempted "to impose union membership on those owner-operators," and succeeded in the attempt. The Board found that independent owner-operators joined the Union and that this "*union membership of owner-operators resulted from illegal provisions of the* [*Master Labor Agreement*] *discussed herein.*" (Emphasis supplied.)

Having found these unfair labor practices and their consequences, in the context of a lengthy battle in which the Teamsters have repeatedly used one method or another to achieve the same forbidden results, the NLRB pulled all the effectiveness out of its Administrative Law Judge's remedy. The Board merely ordered the Union and Associations to cease-and-desist from enforcing the specific unlawful terms of their Master Labor Agreement, which was due to expire five weeks later in any event. The Board made no attempt even to fashion a more meaningful cease-and-desist order,

left the violating Union holding the financial fruits of its violation, and did nothing to restore the victimized owner-operators to the position they would have been in had the violation not occurred.

CDTOA respectfully submits that this remedial decision squarely conflicts with the mandate of Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), which requires that when the Board finds that a person has committed an unfair labor practice, it "shall issue . . . an order requiring such persons . . . to take such affirmative action . . . as will effectuate the policies" of the Act. Notwithstanding the substantial discretion which is properly accorded the NLRB in fashioning affirmative remedies, the Board has *no* discretion to refuse to require affirmative action that will "effectuate the policies" of the Act.

Obviously, Section 10(c)'s "grant of remedial power is a broad one," *NLRB v. Strong*, 393 U.S. 357, 359 (1969), and no one questions that the NLRB had the power to order the make-whole remedy designed by its Administrative Law Judge. Because Section 10(c) "charges the Board with the task of devising remedies . . . to undo the effect of violations of the Act," *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), the NLRB's summary rejection of a readily available, feasible and effective make-whole remedy in this proceeding would raise serious questions even if the underlying principles were first presented for examination in this case.

But the question is hardly novel, and the NLRB and the federal courts have repeatedly, in varying contexts, applied the sensible proposition that when an unfair labor practice has forced its victims to make financial payments, reimbursement of those payments effectuates the purposes of the Act by redressing at least part of the injury done, helping to restore the situation which would have existed in the

absence of an unfair labor practice, and providing a disincentive to repeated unlawful conduct. *See, e.g., Graphic Arts International Union, Local 280*, 235 NLRB 1084 (1978), *enforced*, 596 F.2d 904 (9th Cir. 1979); *Local 964, United Brotherhood of Carpenters and Joiners*, 181 NLRB 948 (1970), *enforced*, 447 F.2d 643 (2nd Cir. 1971); *Passaic Daily News*, 222 NLRB 1162 (1976); and *Double A Products Company*, 134 NLRB 222 (1961). *See also Sheraton-Kauai Corporation v. NLRB*, 429 F.2d 1352, 1357-58 (9th Cir. 1970), and cases cited. Indeed, precisely that result has been ordered by the NLRB in "hot cargo" cases which are factually indistinguishable from the circumstances presented here. *See, e.g., Sheet Metal Workers International Association, Local Union No. 223*, 196 NLRB 55 (1972), *remanded on other grounds*, 498 F.2d 687 (D.C. Cir. 1974), *modified with reimbursement order continuing*, 214 NLRB 786 (1974); and *Local 814, International Brotherhood of Teamsters, etc. (Santini Bros., Inc.)*, 208 NLRB 184 (1974), *remanded for clarification*, 512 F.2d 564 (D.C. Cir. 1975) (per curiam), *order affirmed*, 223 NLRB 752 (1976), *enforced*, 546 F.2d 989 (D.C. Cir. 1976) (per curiam), *cert. denied*, 434 U.S. 818 (1977).

Thus it will not do for the Board to assert, *ipse dixit*, that a reimbursement order would be "*generally* overbroad and inappropriate in the context of 8(e) violations." The Court below is quite correct that "evidence of coercion is not necessary to prove a violation" of Section 8(e). But it is quite another thing to say, when the Board *has* proven *both* the "bare" contractual violation *and* its coercive enforcement, that the victimized owner-operators are not entitled to the remedy which is appropriate in the circumstances of this case. On the Board's own findings, this case is totally unlike *Local 60, United Brotherhood of Carpenters and Joiners v. NLRB*, 365 U.S. 651 (1961), where this Court

reversed a Board order effectively reimbursing union dues to "old-time union men," whose union membership was not "induced, obtained or retained in violation of the Act." *Id.* at 655, 656.

Having found that the unfair labor practice in this case was coercively implemented, and that independent owner-operators were forced to join the Union, the Board had an obligation either to order make-whole reimbursement to redress the injury done, or at least to articulate a reasonable basis for concluding that reimbursement would be somehow inappropriate in the circumstances of the case presented. Obviously, the Board did neither thing, and the Court below erred in allowing that result to stand.

CONCLUSION.

CDTOA respectfully submits that if a writ of certiorari is issued in this case, the entire single judgment of the Court of Appeals should be reviewed and reversed on the question of the appropriate remedy.

Respectfully submitted,

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Opposition

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In the Supreme Court of the United States

October Term, 1981

No. 81-1627

LARRY SHEPARD,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTERVENOR STATUS OF LOCAL 36

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 was the Intervenor in the action below. Pursuant to U.S. Sup. Ct. Rule 21, Local 36 is a party to these proceedings. Local 36 will hereinafter refer to itself as "Intervenor," "Local 36," or the "Union."

QUESTIONS PRESENTED

1. Whether the court below erred in holding that, absent a trial on the issue of coercion and alleged losses resulting therefrom, the Board did not abuse its discretion in declining to require reimbursement of dues, fees, and fringe benefit contributions paid as a result of the existence of a Collective Bargaining Agreement found to be in violation of Section 8(e) of the Labor-Management Relations Act.

2. Whether the court below erred in holding that the Board's cease and desist was sufficient to effectuate the policies of the Act.

In the Supreme Court of the United States

October Term, 1981

No. 81-1627

LARRY SHEPARD,
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NATIONAL LABOR RELATIONS BOARD,
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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

APPLICABLE STATUTORY PROVISION

Although Petitioner repeatedly referred to Section 303, he did not reproduce it in his brief. The relevant language is as follows:

> SEC. 303(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended."

[ED. NOTE: Section 303(a) was amended by Section 704(e) of the Labor-Management Reporting and Disclosure Act of 1959, effective 60 days after enactment. The effect of the amendment is to make the damage remedy applicable to secondary boycotts as now defined under Section 8(b)(4).]

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

STATEMENT OF THE CASE

The case before the District of Columbia Circuit was the culmination of a long series of events involving the concern of the Intervenor Local 36 with diminishing work opportunities for its members as a result of subcontractors' use of nonunion "owner-operators" to perform work traditionally performed by union employees.

In 1965 Local 36 amended certain owner-operator provisions of its Master Labor Agreement to conform to the then state of the law. In October of 1968 the National Labor Relations Board held that language in the Master Labor Agreement requiring proof of independent contractor status in order to "clear" owner-operators for project work did not violate Section 8(b)(4) of the Act. *Local 36 and the Griffith Company*, 173 NLRB No. 62 (1968).

Subsequently, in cases involving owner-operators in the Los Angeles area, *AGC, et al.*, 201 NLRB No. 311 (January 17, 1973) and related cases the National Labor Relations Board held that owner-operators were, in fact, not contractors but employees.

Following the *AGC* decision the Regional office and the office of the General Counsel of the National Labor Relations Board ruled repeatedly that owner-operators in San Diego County were employees within the meaning of the Act:

Building Material & Dump Truck Drivers, Local 36, Case No. 21-CC-1632 (1975);

Tri-County Trucking, Case No. 21-RD-1235 (1975);

Roczey Grading and Demolition, Case No. 21-RD-1286 (1975); and

Kirst Construction Company, et al., Case Nos. 21-CA-14118, 21-CA-14119, 21-CB-5458.

[Agency Record, pp. 75-91].

Against this background of National Labor Relations Board's rulings that owner-operators were employees and not contractors and the agreement was valid as negotiated, the Collective Bargaining Agreement which was negotiated in June of 1977 treated owner-operators as employees with respect to all work covered by that Agreement.

In October of 1977 the Ninth Circuit Court of Appeals ruled in *California Dump Truck Owners Association, Inc. v. AGC (Teamsters 36),* 562 F.2d 607 (9th Cir. 1977) that the provisions were valid under the antitrust laws because they were legitimate efforts by the Union to preserve bargaining unit work. At approximately the same time a different panel of the Ninth Circuit Court of Appeals ruled in *AGC v. NLRB,* 564 F.2d 271 (9th Cir. 1977) that owner-operators were not employees but, in fact, independent contractors.

The Agreement which is being challenged here, the Master Labor Agreement, had already been negotiated

As a response to charges filed in a case entitled *Operative Plasterers' and Cement Masons International Association, Local Union 744, et al.*, Case No. 21-CE-195, Teamsters 36 agreed in a Settlement Agreement to enforce the subcontracting provisions (including the definition of job site) to the National Labor Relations Board's concept of job site, namely, "the site of construction, alteration, painting, or repair."

In August of 1978 Local 36 executed amendments to the Master Labor Agreement, again dealing with the definition of job site. Those amendments were executed by Local 36 on August 16, 1978. Thus, Local 36 was attempting to respond to changes in the state of the law to conform with the law subsequent to the Ninth Circuit decision in October of 1977. It should be noted that it was not until December of 1978 that the National Labor Relations Board reversed itself on the owner-operators' issue officially, *AGC, et al.*, 239 NLRB No. 100 (1978).

Judge Robb, in his carefully written decision below accurately and succinctly set forth the history of the case at bench as follows:

> "In December 1977 the Dump Truck Owners filed a charge with the Board alleging that the [Master Labor] Agreement violated section 8(e) of the Act. The charge alleged that the Union and the Contractors had agreed to cease, and had actually ceased, doing business with the non-union dump truck operators. In October 1978 Larry Shepard filed a similar charge against the Union, alleging that the Union had violated sections 8(b)(4)[2] and 8(e) of the Act by pressuring Terra Trucking not to broker his services because he did not belong to the Union notwithstanding that he is an independent contractor. At the request of the

Regional Director, Shepard filed a new charge containing only the 8(e) allegation.

"In January 1979 the Regional Director consolidated the two charges and issued a complaint alleging only a violation of section 8(e) by the Union and the Contractors. After a full trial the Administrative Law Judge found that the truck operators are independent contractors and not employees under the Act. Thus, the Union and the Contractors violated section 8(e) by agreeing not to do business with the non-union truck operators and their brokers. The ALJ recommended that the Board order the Union and the Contractors to cease and desist from enforcing the unlawful provisions of the Agreement. The ALJ further recommended that the Union and the Contractors be ordered to make whole those truck operators who were compelled to join the Union and pay dues, initiation fees, assessments, and contribute to Union trust funds.

On exceptions and briefs the Board affirmed the ALJ's findings and conclusions, as relevant here, but deleted the make-whole remedy recommended by the ALJ. The Board ordered the Union and the Contractors to cease enforcing the unlawful portions of the Agreement and to post notices. The Union, Mr. Shepard, and the Dump Truck Owners petition for review and the Board petitions for enforcement of its order."

[Appendix Petition at pp. 5a-7a, footnotes omitted].

After the submission of briefs and oral argument before McGowan and Robb, Circuit Judges, and District Judge Jameson for the District of Montana [sitting by designation pursuant to 28 USC §294 (d)], Judge Robb issued the Court's opinion on December 4, 1981. On or about March 4, 1982, Petitioner filed his Petition for a Writ of Certiorari.

ARGUMENT

I

THE DECISION BELOW IS SOUNDLY BASED ON PRINCIPLES OF FAIRNESS AND DUE PROCESS.

A careful reading of Judge Robb's opinion demonstrates that he wrote it keeping in mind two points which were crucial to a proper analysis of the case before the Court. The first is that coercion is not an element in an unfair labor practice charge based upon an alleged violation of Section 8(e) of the Act. That section, in a sense, is a strict liability provision. It makes it unlawful for a labor organization and employer to "enter into any contract or agreement, express or implied, whereby such employer ceases or . . . agrees to . . . cease doing business with any other person. . . ." The agreement may be totally voluntary and may never actually be enforced. The mere act of entering into it constitutes an unfair labor practice. The section also specifies that any such agreement, to the extent that it violates Section 8(e), is "unenforceable and void."

Pausing to consider this on a philosophical level, it becomes clear that the entire focus of proceedings under Section 8(e) is on the nature of the agreement, not upon the circumstances under which it is entered into or upon its effects, if any. The Board has no burden of proving that the Employer was coerced into the agreement or that the agreement was ever actually enforced, let alone that it resulted in any monetary damages of any kind to anyone.

Pausing again, looking at such proceedings from a respondent's point of view, it is obvious that the charged parties' attention in preparing to defend against such charges must and will be focused on establishing the validity of the agreement itself. Thus, in the proceedings before the Board in this case, the central issue, indeed the

only issue, was whether the owner-operators were "other persons" within the purview of 8(e) or employees who, under a union security clause, could be required to join a union as a condition of continued employment.

Coercion is an element of an unfair labor practice alleging a violation of Section 8(b)(4) which states in pertinent part that:

> "(b) It shall be an unfair labor practice for a labor organization or its agents —
>
> (4) (ii) to *threaten, coerce, or restrain* any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is —
>
> (A) forcing or requiring any self-employed person to join any labor . . . organization . . . .
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . . ."
>
> [Emphasis added].

This distinction was apparently not lost on Judge Robb who pointed out that Shepard had initially filed charges alleging violations of both sections 8(b)(4) and 8(e), but had subsequently, at the request of the Regional Director, withdrawn them and filed a charge alleging a violation of Section 8(e) alone. [Brief for Petitioner, Appendix pp. 6a and 7a]. Judge Robb went on to point out that the complaint issued by the Regional Director in the consolidated cases alleged *only* a violation of Section 8(e) by the Union and the Contractors.

The second crucial factor apparently considered by Judge Robb in writing the opinion is the uncontroverted

fact that there is no precedent for a reimbursement remedy in an 8(e) case absent notification to the charged party that it will be called upon to defend itself on the issue of coercion. Thus, in the one case where the Board adopted such a remedy, *Local 814, Teamsters (Santini Brothers)*, 208 NLRB No. 184 (1974) *enforced* 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818 (1977) the charges against the union included violations of 8(b)(4) where coercion is an issue as well as 8(e) where it is not. (See Petitioner's brief at p. 52a).

Moreover, the Ninth Circuit Court of Appeals is in agreement with the Board and the Court below that it has long been established that, absent coercion, reimbursement is inappropriate. (See Petitioner's brief at Appendix p. 50a wherein the Ninth Circuit cites *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651 (1961).

Judge Robb soundly laid the foundation for his opinion on these two crucial points: the absence of coercion as an element in 8(e) proceedings and the impropriety of a reimbursement remedy in the absence of proof of coercion:

> "Such contracts or agreements, with certain exceptions not germane here, are unlawful *per se*; evidence of coercion is not necessary to prove a violation of the Section. In the absence of coercion and because union members receive benefits as well as assume burdens, the Board properly finds it inappropriate to order reimbursement of sums paid pursuant to agreements that violate section 8(e); obviously, reimbursement to union members who were not coerced into joining would result in an unjust windfall to them. It was for this reason that the Supreme Court, in the case cited by the Board, *Local 60, United Bhd. of Carpenters and Joiners v. NLRB*, 365 U.S. 651 (1961), held that the

Board was not authorized to require the union to refund dues and fees when there was no evidence that any of the employees had been coerced."

[Petitioner's Brief, Appendix P. 13a].

Judge Robb went on to emphasize that no violation which had coercion as an element had been alleged in the case before the Court (*Id.*). He pointed out, correctly, that a *sua sponte* finding of coercion would have been improper (*Id.* at p. 14a).

The reasoning is clearly and soundly based upon fundamental principles of due process and fairness which require that a defendant have notice of the elements of the charges against him and an opportunity to defend against them.

The Ninth Circuit Court apparently missed this point, perhaps because there was no previously withdrawn 8(b)(4) charge in the case before it.

One final note: Petitioner asserts that the Board "conceded" in its brief that Shepard and other Terra drivers were coerced and cites page 40 of the Board's brief in the District of Columbia Circuit. This is a blatant distortion of the Board's argument, the gravamen of which was the lack of any serious inquiry into the issue. Pages 40 and 41 of the Board's Brief are reproduced herein at Appendix, Pages 1a and 2a. They speak for themselves.

II

THE COURT BELOW PROPERLY UPHELD THE BOARD'S DETERMINATION THAT THE CEASE AND DESIST ORDER WAS SUFFICIENT.

Even Petitioner concedes that the Board has broad discretion in formulating remedies. Petitioner goes on to cite *Acco Construction Equipment Inc. v. NLRB*, 511 F.2d

848, 852 (9th Cir. 1975). Once again, this case involved charges of violations of both 8(e) and 8(b)(4) and a specific finding of "coercive economic pressure" as part of the Board's decision on the 8(b)(4) charge. It should also be noted that, as in the Ninth Circuit Owner-Operators case, the court remanded in part to give the Board an opportunity to show good cause why reimbursement should not be ordered.

The Board's broad discretion to formulate remedies is too well established to warrant extensive argument here.

Petitioner's arguments with respect to the insufficiency of a 303 lawsuit are not persuasive. In fact, in part they further demonstrate the impropriety of a reimbursement order absent a trial on the issue of coercion.

Petitioner first concedes that it is difficult to determine whether an individual is an independent contractor or an employee. In the instant case the determination has already been made by the Board and upheld by the Circuit Court. Any future litigants may surely file charges and have the issue decided by the Board or they may file under 303 and allow the courts to determine their status.

With respect to the economic resources argument, Petitioner clouds the issue by discussing attorney's fees in underlying Board proceedings. He also ignores the existence of class action remedies. The fact that one individual's losses may be so miniscule as to make litigation inadvisable is the reason such remedies exist and, of course, there are no jurisdictional limits under Section 303. He further ignores the provision of 303 which provides that an injured party may bring suit in a United States district court *or any other court* having jurisdiction. If the amount is that small, Petitioner can go to a small claims court where no

attorneys are permitted or required. San Diego Small Claims Court jurisdiction at present is $1,500.

It is simply not true, as the Petitioner states, that "until this board's decisions" an individual in Petitioner's situation could expect a make whole remedy, since no such remedy, absent a trial on the issue of coercion had ever been granted for an 8(e) violation. Petitioner chose to avoid a trial on this issue by withdrawing his 8(b)(4) charge. He cannot be heard to complain of surprise now.

Petitioner's final argument actually militates against him. He points out that courts have uniformly required that the elements of an 8(b)(4) charge be established as a prerequisite to a reimbursement order. Once again, a trial on the issue of coercion is essential for the recovery of damages.

Finally, it should be noted that what Petitioner seeks basically is a holding that would in effect alter Congressional intent by forcing an award of damages for violation of 8(e) without a hearing on the issue of coercion. As Petitioner himself points out, Congress specifically provided for damage actions arising out of conduct violative of Section 8(b)(4), where coercion is an element, but not in actions arising out of conduct violative of Section 8(e). Section 8(e) itself provides for the sanction of unenforceability of contracts which violate its prohibitions. There is simply no rationale which justifies interference with the Board's discretion with regard to remedial measures to an extent that goes far beyond what Congress made available through court action.

CONCLUSION

The decision below is soundly based upon well established principles of due process and deference to the Board's authority to fashion remedies.

The petition for certiorari should be denied.

Dated: April 2, 1982

DOMNITZ, PROCHAZKA AND LEVINE
A Professional Corporation

By: RICHARD D. PROCHAZKA
By: LINDA M. FORD

EXCERPT FROM THE BOARD'S BRIEF BELOW

Although the record did not reveal precisely how many owner-operators are hired by the Contractors Associations members, it is undisputed that Terra, alone, had sub-haul agreements with 200 to 250 owner-operators (supra, p. 10). Thus, it would appear that a great number of owner-operators could theoretically have been coerced into joining the Union. However, there is not even a scintilla of evidence to indicate that any owner-operator – other than a handful working through Terra – were ever subjected to any coercion, or were not members of the Union.[16/]

The only evidence with respect to coercion of owner-operators involves Terra. ReCupido, president of Terra, testified that he received a letter from the Union requesting that seven owner-operators working through Terra be required to join the Union, pursuant to Terra's earlier signing of the MLA. (Since Terra had subhaul agreements with about 200-250 owner-operators, and regularly brokered for 25-30 (*supra*, p. 10), it would appear that a significant number may have already been members of the Union. No evidence of coercion was presented as to any of these persons.) And although ReCupido informed the seven that they would have to join the Union if they wished to continue to use his services (Tr. 89), he later discovered "that some of them did not" (Tr. 90); the record is silent as to how many did not, but at no time did ReCupido ever stop working with any of them (Tr. 89-90). Thus, the record establishes that of the seven brought to ReCupido's attention by the Union, only Shepard definitely joined the Union and did so under protest. In these cir-

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16/ While Kissinger manager Herring testified that Kissinger became a signatory to the MLA, she gave no testimony as to whether this resulted in any owner-operators joining the Union.

cumstances, where only one owner-operator out of perhaps several hundred was shown to have involuntarily joined the Union and where no Section 8(b)(4) violation was alleged, the Board acted within its discretion in declining to make a *sua sponte* finding of a Section 8(b)(4) violation and in therefore declining to grant a make-whole reimbursement remedy.[17/]

17/ Nor is there any evidence that any owner-operators incurred losses due to payments that may have been made on their behalf to union benefit plan funds. Indeed, Recupido testified that, for jobs performed under the MLA, Terra billed the customers a higher-than-normal amount in order to compensate the owner-operators for any losses they would have incurred had benefit fund deductions been made from the normal levels of compensation (Tr. 157-158).

Opposition

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Supreme Court, U.S.
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CLERK

No. 81-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SHEPARD, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

and

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, ET AL., *Intervenors*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERVENORS ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there a genuine conflict between the federal courts of appeals which justifies this Court granting certiorari?

2. Do the issues raised by Petitioner contain such important questions of federal law so as to warrant this Court's review?

3. Is the National Labor Relations Board required to order a make-whole remedy when there is a bare Section 8(e) violation, in the absence of allegations and proof of coercion in enforcing an unlawful "hot cargo" agreement?

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No. 81-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SHEPARD, *Petitioner,*

v.

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and

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERVENORS ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL. IN OPPOSITION

APPLICABLE STATUTORY AUTHORITY

The relevant statutory authority involved in this case is set forth in the National Labor Relations Act, as amended, (29 U.S.C. § 151, et seq.) at Sections 8(b)(4)(ii)(A), 8(e), and 10(c). Also applicable is the Labor Management Relations Act, as amended, (29 U.S.C. § 141 et seq.) at Section 303. They provide, in pertinent part, as follows:

Section 8: Unfair Labor Practices.

(b) It shall be an unfair labor practice for a labor organization or its agents . . .

* * * *

(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) . . . .

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

* * * *

Section 10: Prevention of Unfair Labor Practices.

(c) If . . . the Board . . . shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act . . . .

Section 303: Boycotts and Other Unlawful Combinations.

(a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

STATEMENT OF THE CASE

In June, 1977, the ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., the SAN DIEGO BUILDING CONTRACTORS ASSOCIATION, and the ENGINEERING AND GENERAL CONTRACTORS ASSOCIATION ("Employer Associations") and various unions representing employees in the construction industry in San Diego County, including the BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL UNION NO. 36 ("Union"), entered into the construction industry Master Labor Agreement ("MLA") for San Diego County.

At the time the MLA was entered into, owner-operators were considered by the National Labor Relations Board ("NLRB" or "Board") to be "employees" within the meaning of the National Labor Relations Act ("NLRA" or "Act"). *See Contractor Members of the Associated General Contractors of California, Inc.*, 201 NLRB 311 (1973). Even so, the Employer Associations' position in the 1977 negotiations with respect to Section 42 of the MLA[1] was that it be deleted. However, in reliance upon the existing Board law, and under threat of economic action, the Employer Associations acquiesced to the Union's demand for inclusion of Section 42 in the MLA.[2]

In December, 1977, the CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION ("CDTOA"), filed the original charge in this matter contending that the Employer Associations

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[1] Section 42 of the MLA is the provision which was held to be violative of Section 8(e).

[2] The NLRB reversed itself as to the status of owner-operators after the 1977-1980 MLA was agreed to. *See Associated General Contractors of California, Inc.*, 220 NLRB No. 540, *enf. denied*, 564 F.2d 271 (9th Cir. 1977), *reversed on remand*, 239 NLRB 686 (1978).

and the Union violated Section 8(e) of the Act by agreeing to Section 42 of the MLA. In October, 1978, Petitioner filed a similar charge against the Union, alleging that the Union had violated Sections 8(b)(4) and 8(e) of the Act. At the request of the Regional Director, Petitioner filed a new charge containing only the 8(e) allegation.

The facts surrounding Petitioner's charges are as follows: Petitioner was an owner-operator who owned a tractor and primarily worked for Terra Trucking Company ("Terra"), hauling various types of materials for different contractors. Terra was owned and operated by Fred ReCupido. Petitioner used Terra for brokering services and had a sub-haul agreement with Terra. Terra had sub-haul agreements with approximately 200-250 owner-operators.

ReCupido signed a "short form" agreement in 1974 pursuant to provisions of the San Diego County MLA. Said agreement renewed itself from year to year. In August, 1978, ReCupido received a letter from the Union stating that seven owner-operators, including Petitioner, who were not members of the Union, should no longer work through Terra until they joined the Union. In September of 1978, ReCupido informed the seven owner-operators that they should join the Union if they wanted to work through Terra. Of the seven owner-operators, evidence in the record indicated that only Petitioner definitely joined the Union. *The evidence also established that some of the seven owner-operators did not join the Union, though all continued working through Terra.*

On January 29, 1979, the Board consolidated the CDTOA's and Petitioner's charges and issued a complaint alleging that the Employer Associations and the Union had violated Section 8(e). The case was tried before an Administrative Law Judge ("ALJ")

who found that the Employer Associations and the Union had violated Section 8(e). The ALJ's remedial order consisted of a cease and desist order, a requirement that the Employer Associations and the Union post notices, and a requirement that the Employer Associations and the Union jointly and severally make whole owner-operators for their payments to the Union of dues, initiation fees, assessments and contributions to trust funds.

Upon exceptions to the ALJ's decision, the matter came before the Board. On May 8, 1980, the Board affirmed that certain provisions of the 1977-1980 MLA violated Section 8(e) of the Act. However, the Board noted that "[t]here is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion" by the Union and Employer Associations, and that reimbursement orders, such as the make-whole order recommended by the ALJ, are "generally overbroad and inappropriate in the context of 8(e) violations," and so declined to adopt the make-whole order. *Building Material and Dump Truck Drivers, et al.*, 249 NLRB 386, 386 (1980). Additionally, the Board noted that the aggrieved owner-operators, as independent contractors, may pursue a damage claim under Section 303 of the Act. *Id.*

On December 4, 1981, the District of Columbia Circuit enforced the Board's order in all respects. The court held that in the absence of allegations and proof of coercion to enforce "hot cargo" agreements, the Board is not authorized to require the Union to refund dues and fees. *Teamsters Local 36* v. *NLRB*, ...F.2d..... 108 LRRM 3153, 3157 (D.C. Cir. 1981). The court noted that make-whole remedies are appropriate when employers or self-employed persons have been subjected to violations of Section 8(b)(4)(ii)(A) of the Act. *Id.* at 3158. However, since a violation of Section 8(b)(4)(ii)(A) was not

alleged, the court concluded that the Board's order was sufficient to effectuate the policies of the Act.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I

THERE IS NO GENUINE CONFLICT BETWEEN THE FEDERAL COURTS OF APPEALS.

Petitioner's primary basis in support of the petition for writ of certiorari is that federal courts of appeals decisions are in conflict on the same matter. Petitioner cites one case to support this "conflict" contention. *Joint Council of Teamsters, No. 42* v. *NLRB,* ..... F.2d ....., 109 LRRM 2181 (9th Cir. 1981) (*"Teamsters, No. 42"*). However, *Teamsters, No. 42* is not in conflict with the decision of the court of appeals below, because the facts and the law are distinguishable.

A. *The Allegedly "Conflicting" Ninth Circuit Decision Relied Upon by Petitioner Is Distinguishable on Its Facts.*

In the underlying NLRB case herein, it was never alleged that the Union or the Employer Associations coerced Petitioner with an object of forcing him to join the Union,[3] and there was never a finding of fact that such coercion occurred. Moreover, there were neither allegations nor findings of fact that Petitioner, or any other owner-operator, suffered financial losses directly attributable to being coerced to join a labor organization. The court of appeals did not disturb these findings or rule that they were not supported by substantial evidence.

In contrast, the underlying Board decision in *Teamsters, No.*

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[3] Similarly, the CDTOA never alleged that its members were subjected to coercion.

42 addressed allegations that the Respondent Union engaged in threatening or coercive conduct with an object of forcing self-employed persons to join a labor organization. *Joint Council of Teamsters, No. 42, et al.*, 248 NLRB 808, 808 (1980). In addition, the Board specifically found that:

> "Uncontroverted record evidence conclusively demonstrates that . . . (Respondent Union) threatened a self-employed dump truck owner-operator, Lendelle Kinder, with loss of a job . . . unless Kinder would become a member of Local 420. The evidence further shows that Respondent Local 420 . . . coercively insisted that . . . (a signatory employer) cease doing business with independent contractors who were not and would not become members of Local 420." *Id.* at 817.

Based on that evidence, the Board found that the Respondent Union "threatened, coerced, and restrained" the owner-operators with an object of forcing them to join a labor organization. *Id.* Thus, the cases relied upon by Petitioner are not in conflict because they have major factual differences with respect to the issue of actual coercion. Therefore, certiorari is inappropriate in the present case.[4]

B. *The Ninth Circuit Decision Is Distinguishable on the Law.*

Teamsters, No. 42 is also distinguishable in regard to conclusions of law that the Union coerced self-employed persons to

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[4] Petitioner's Questions Presented focus on the propriety of the NLRB requirement that in order for there to be a make-whole remedy in a Section 8(e) context there must first be a finding that actual coercion was used to enforce an agreement violative of Section 8(e). This is inconsistent with Petitioner's assertion that certiorari should be granted due to conflict in the courts of appeals. Petitioner is essentially stating that since he neither alleged nor proved that actual coercion occurred the Court should alter NLRB precedent and rule that actual coercion is not a necessary element to justify a make whole remedy. On the other hand, Petitioner is supporting his conflict contention by focusing on a case, unlike the present case, where actual coercion was alleged and found.

join a labor organization pursuant to an unlawful "hot cargo" agreement. In the underlying Board decision herein, there were neither allegations nor conclusions of law that the Union engaged in coercive conduct in violation of Section 8(b)(4) of the Act. In fact, the court of appeals specifically stated that: "[t]he petitioners suggest that the Board should have made a *sua sponte* finding of Section 8(b)(4)(ii)(A) violation; but since no such violation was charged, a *sua sponte* finding would have been improper." 108 LRRM at 3158.

In contrast, in *Joint Council of Teamsters, No. 42, et al.*, the Board held that:

> "By threatening, coercing, and restraining persons . . . with an object of forcing or requiring the independent contractors of Irvine to join a labor organization, . . . (Respondent Union) has engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(A) of the Act." 248 NLRB 808, 817.

This finding was not reversed by the Ninth Circuit, and there was no ruling that it was not supported by substantial evidence.

Thus, the Ninth Circuit decision relied upon by Petitioner involves circumstances that place it in a totally different category from the present case; consistent with substantial Board precedent, the finding of an 8(b)(4) violation in *Teamsters, No. 42* potentially entitles injured parties in that case to make-whole damages which are unavailable here, in a bare 8(e) violation context. *See, e.g., Local 814, International Brotherhood of Teamsters, etc. (Santini Brothers, Inc.)*, 208 NLRB 184, 201-202 (1974), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818 (1977); *Sheet Metal Workers, Local 223*, 196 NLRB 55, 57 (1972), *remanded*, 498 F.2d 687 (D.C. Cir. 1974), *modified*, 214 NLRB 786 (1974).

However, the Ninth Circuit completely ignored the Board's

conclusion of law with regard to Section 8(b)(4)(ii)(A), and spent a substantial portion of its decision addressing the issue of whether make-whole remedies are appropriate in a bare 8(e) context. 109 LRRM at 2184-86. In addition, the Ninth Circuit continuously focused on whether or not a collective bargaining agreement which is violative of Section 8(e) is in and of itself coercive. (*Id.*) Since the Board had found that actual coercion did occur, and that the Respondent Union had acted in violation of Section 8(b)(4)(ii)(A), this entire discussion by the Ninth Circuit must be regarded as dicta. As such, the Ninth Circuit decision relied upon by Petitioner is not in conflict with the underlying court of appeals decision herein, and there is no basis for granting certiorari.

C. *The Issues Raised by Petitioner Are Not Ripe for Review.*

To the extent that a potential conflict could exist between the circuits, said conflict has yet to manifest. The underlying court of appeals decision upheld the Board order. The Ninth Circuit decision relied upon by Petitioner did not reverse the Board order. Rather, it remanded the case to the Board "to fashion a make-whole remedy *or to show good cause why a make-whole remedy would not effectuate the purposes of the Act.*" 109 LRRM at 2186. (Emphasis added.) Thus, no true conflict exists, as the Board has been given an opportunity to show good cause to support its remedial order.[5]

[5] Moreover, the Ninth Circuit, relying on *Acco Construction Equipment, Inc.* v. *NLRB*, 511 F.2d 848, 852 (9th Cir. 1975), stated that the Board should give *rational ground* to justify its position not to order a refund of fees, dues and fringe benefit contributions. 109 LRRM at 2184. The Board's long-standing position, consistent with the policies of the Act, that make-whole is appropriate in an 8(b)(4) context, but not in an 8(e) context, is certainly a rational ground, especially in light of the broad deference that reviewing courts give to NLRB decisions.

The Board has consistently held that make-whole remedies are inappropriate when bare violations of Section 8(e) occur but that make-whole remedies are appropriate where there are violations of 8(b)(4) in conjunction with 8(e). Since the Ninth Circuit decision involved both 8(b)(4) and 8(e) violations, the Board may resolve any alleged conflict by relying on its own precedent. Until such time as a genuine conflict between the circuits exists, the matter is not ripe for determination on certiorari.

II

THE DECISIONS BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

A. *The Decisions Below Are Fully in Accord With Applicable Law.*

In cases involving bare violations of Section 8(e), the Board and reviewing courts have never imposed make-whole remedies. *See, e.g., Mishara Construction Company* v. *International Brotherhood,* 554 F.2d 488, 491 (1st Cir. 1977) (court ruled that a party could not recover damages for an 8(e) violation, standing alone); *Newspaper & Periodical D. & H.U., Loc. No. 921* v. *NLRB,* 509 F.2d 99, 100 (9th Cir. 1974) (court enforced a Board order holding that compensatory damages or backpay are not appropriate remedies where union and employer violated Section 8(e)). *See also Marriott Corporation* v. *NLRB,* 491 F.2d 367 (9th Cir. 1974), *cert. denied,* 418 U.S. 881 (1974); *NLRB* v. *Joint Council of Teamsters No. 38,* 338 F.2d 23 (9th Cir. 1964); *International Longshoremen's Assoc., Local 1410,* 235 NLRB 172 (1978).

Section 8(e) does not deal with the issue of coercion with regard to unlawful "hot cargo" agreements; it merely makes such

agreements unlawful. Section (8)(b)(4)(ii)(A) specifically deals with whether persons have been coerced into making or operating under agreements which violate Section 8(e). Based on these two sections the Board has consistently held that in order to impose a make-whole remedy in an 8(e) context there must first be an 8(b)(4) violation. *See, e.g., General Longshore Workers, ILA, Local 1418, et al.*, 235 NLRB 161 (1978); *International Longshoremen's Assoc., Local 1410*, 235 NLRB 172 (1978).[6]

Petitioner requests this Court to determine whether actual coercion must be used to enforce a voluntary "hot cargo" agreement before a make-whole remedy is appropriate for a violation of Section 8(e). However, Petitioner does not cite any cases where an employer or a union has had a make-whole remedy imposed for a violation of Section 8(e), standing alone.[7] Thus, without any authority to support his position, Petitioner is requesting this Court to address and reverse long-standing Board and reviewing court precedent.

Furthermore, neither the Board nor the court below made specific findings that actual coercion occurred, or that any dam-

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[6] An employer has *never* been ordered to reimburse independent contractors or other businesses for violations of Section 8(e), even when tied to Section 8(b)(4) violations. *See, e.g., Local 814, International Brotherhood of Teamsters, etc. (Santini Brothers, Inc.)*, 208 NLRB 184, 201-202 (1974), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818 (1977); *Local 282, Teamsters, etc.*, 197 NLRB 673, 673-74 (1972); *Local 141, Sheet Metal Workers, etc.*, 174 NLRB 843, 843-44 (1969); *Local 98, Sheet Metal Workers, etc.*, 174 NLRB 104, 104-105 (1969), *enf. as mod.*, 433 F.2d 1189 (D.C. Cir. 1970).

[7] In addition, Petitioner fails to cite any cases where an employer has had a make-whole remedy imposed upon it for a violation of Section 8(e) in conjunction with a Section 8(b)(4) violation.

ages resulted from alleged coercion.[8] The court below correctly held that absent coercion, reimbursement is inappropriate, because union members receive benefits as well as assume burdens. 108 LRRM at 3157. This ruling is consistent with United States Supreme Court authority which holds that the Board has no authority to require the refund of dues and fees by a union when there is no evidence that employees have been coerced. *Local 60, United Brotherhood of Carpenters and Joiners* v. *NLRB*, 365 U.S. 651, 655 (1961) (such a make-whole order would be "punitive and beyond the power of the Board.") Thus, absent allegations and proof of coercion, make-whole is inappropriate.

B. *The Decision Below Is Consistent With the Legislative Intent of Section 8(e) and Effectuates the Purposes of the Act.*

Section 10(c) of the Act grants the Board broad discretion in devising remedies to effectuate the policies of the Act. *See NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). A Board order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those

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[8] Petitioner seems to suggest that because he initially filed charges alleging violation of Section 8(b)(4) and Section 8(e), and subsequently agreed to withdraw the charges and replace them with charges alleging violation of Section 8(e), he should be entitled to a make-whole remedy pursuant to Section 8(b)(4). Such a position is unjustified. Petitioner was fully able to insist upon an investigation of Section 8(b)(4) charges. His voluntary withdrawal of Section 8(b)(4) charges does not entitle him to reassert such charges now because he is unhappy with the remedies available pursuant to a Section 8(e) violation. The court of appeals correctly stated that "the petitioners suggest that the Board should have made a *sua sponte* finding of Section 8(b)(4)(ii)(A) violation; but since no such violation was charged a *sua sponte* finding would have been improper." 108 LRRM at 3158.

which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

In the present case, the Board's remedial order is completely consistent with well-established precedent, legislative intent, and the policies of the Act. Thus, the remedial order is neither an abuse of the Board's discretion nor a patent attempt to circumvent the policies of the Act and it should be left intact.

Section 8(e) was added to the Act in 1959 along with Section 8(b)(4)(ii)(A). These provisions focus on situations where unions pressure neutral or third party employers to accept agreements which violate the Act.[9] These two provisions of the Act are clearly distinct. Section 8(e) makes the agreements in and of themselves "unenforceable and void," and applies to both unions and employers. Section 8(b)(4)(ii)(A) only applies to unions and makes it unlawful for unions to exert coercion to enforce agreements which violate Section 8(e). Consistent with the clear language of these provisions and the legislative intent of protecting neutral or third party employers from union pressure, the Board and reviewing courts have never held employers or unions liable for make-whole remedies in bare 8(e) cases, but have repeatedly held *unions* liable for make-whole remedies where they violate Section 8(b)(4)(ii)(A).

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[9] The purpose of Section 8(e) is to protect "neutral employers" who were "conscripted" into union organizing campaigns. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 634-635 (1967). The Supreme Court has held that Congress enacted Section 8(e) to make "hot cargo" agreements in and of themselves unlawful, and to alleviate "situation(s) in which such clauses might be employed to exert subtle pressure upon employers . . . ." *Id.* Thus, Petitioner's assertion that Employer Associations should make Petitioner whole is totally inconsistent with congressional intent in enacting Section 8(e).

Section 303 of the Act was revised in 1959, when Section 8(b)(4)(ii)(A) and Section 8(e) were enacted. Section 303 provides victims of Section 8(b)(4) unfair labor practices the right to a cause of action in a federal district court or any other court having jurisdiction over the parties, to recover damages sustained. Section 303 only permits such actions by injured parties against labor organizations. *See, e.g., Meier & Pohlmann Furniture Co.* v. *Gibbons,* 233 F.2d 296 (8th Cir. 1956). The amendments to the Act in 1959 extended Section 303 remedies to violations of newly enacted Section 8(b)(4)(ii)(A), but did not extend Section 303 remedies to violations of Section 8(e). This is further evidence that the legislative intent was to permit monetary remedies when there is a violation of Section 8(b)(4)(ii)(A), but not when there is a bare violation of Section 8(e).[10]

The Ninth Circuit appears to be saying that unlawful "hot cargo" agreements are in and of themselves coercive. Thus, there ought not be a distinction between remedies for 8(b)(4) and 8(e) violations because they both involve coercion.[11] This conclusion, however, flies in the face of applicable Board law and the legislative intent in enacting Section 8(e). Section 8(e) was enacted in response to a perceived "loophole" in the law

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[10] The amendments to Section 303 in 1959, along with the enactment of Section 8(e) and 8(b)(4)(ii)(A), indicate that the policies of the Act could best be effectuated by requiring labor organizations, and not employers, to pay damages for violations relating to coercion and enforcement of unlawful "hot cargo" agreements.

[11] The Ninth Circuit stated:

> "We reject the Board's reasoning that the purposes of the Act are effectuated by reimbursement for violations of § 8(b)(4), but not for violations of § 8(e) . . . . [w]hen an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation." 109 LRRM at 2184.

which enabled unions, through the vehicle of an otherwise lawful collective bargaining agreement, to exert pressure on neutral or third party employers in situations where there was an absence of coercion.[12] Section 8(e) was designed to make "hot cargo" agreements in and of themselves unenforceable and void, irrespective of the fact that the agreement may have been arrived at and enforced without coercion.[13] If mere entry into an unlawful "hot cargo" agreement is coercive, per se, as the Ninth Circuit asserts, then there would have been no need for the 1959 amendments, as all "hot cargo" agreements would have been violative of Section 8(b)(4).

The Board's remedial order is also consistent with the policies of the Act. In attempting to effectuate the policies of the Act, courts stress "that the orders of the Board are required to be remedial and not punitive." *Florida Steel Corp.* v. *NLRB*, 587 F.2d 735, 746 (5th Cir. 1979); *see Local 777, Democratic Union Organizing Com.* v. *NLRB*, 603 F.2d 862, 890 (D.C. Cir. 1979); *NLRB v. Local Union No. 85, Sheet Metal Workers' Int. Ass'n*, 274 F.2d 344, 346-47 (5th Cir. 1960).

A finding that there has been no proof of coercion, as reflected

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[12] This "loophole" is most clearly illustrated by the *Sand Door* decision. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958). In that case, the Court held that Section 8(b)(4)(A) of the 1947 Act (the "Taft-Hartley Act") did not prohibit "hot cargo" clauses or employers' voluntary compliance with such agreements. Rather, the Court held it was unlawful to enforce such clauses by means of strikes, picketing or other coercive union conduct. 357 U.S. at 98-99.

[13] Throughout the committee reports and debates on Section 8(e), it was referred to as a measure designed to close a loophole in Section 8(b)(4)(A) of the Labor Management Relations Act of 1947 (the "Taft-Hartley Act"). *See, e.g.*, S. REP. NO. 187, 86th Cong., 1st Sess. 78-79 (1959); I LEGIS. HIST. at 474-75 (Minority View); H.R. REP. NO. 741, 86th Cong., 1st Sess. 20-21 (1959), I LEGIS. HIST. at 778-79.

in the Board's remedial order, is enough to establish that a reimbursement order would be punitive. In *NLRB* v. *Local Union No. 85, Sheet Metal Workers' Int. Ass'n, supra,* the court of appeals reversed the Board's order that the union refund to employees initiation fees, dues and assessments stating:

> "[i]n the absence of some proof that dues would not have been paid but for the requirement, the Board's reimbursement Order becomes punitive rather than compensatory. As a punitive measure, the refund provision of the Order should not be enforced." *Id.* at 347. *See also Local 60, United Brotherhood of Carpenters and Joiners* v. *NLRB,* 365 U.S. 651, 655 (1961).[14]

Furthermore, the Board's cease and desist order will dissipate the unwholesome effects of violations of the Act and act as a deterrent to subsequent violations. Besides the actual impact of the cease and desist order, any further violation by either the Union or Employer Associations will be subject to contempt proceedings as well as other legal action.

III

THE ISSUES ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

Petitioner's failure to allege a violation of Section 8(b)(4)-(ii)(A) and prove that actual coercion in enforcing a "hot cargo" agreement occurred, resulted in Petitioner's inability to obtain monetary damages at the Board level. Petitioner is now asking that long-standing precedent be altered to overcome his failure to make appropriate allegations and showings of fact at the initial hearing level. However, since Board and court prece-

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[14] In addition, it is the Union, and not the Employer Associations, who has received any dues, fees and assessments from owner-operators. To require reimbursement from the Employer Associations in such an instance would be punitive, not remedial.

dent are clear, and the Board has acted consistent with its remedial authority, Intervenors contend that the issues raised by Petitioner do not warrant this Court's attention. The issues are unique to Petitioner and could have been resolved by proper allegations and showings of fact at the initial hearing level.

Moreover, even in Petitioner's current situation, monetary damages are still available via a Section 303 civil action, provided Petitioner can make a showing of fact that coercion and damages occurred. To remand the case to the Board so that Petitioner may now make allegations of coercion and attempt to prove them is a substantial waste of judicial resources. At this point, a Section 303 action is the most appropriate means for Petitioner to attempt to obtain monetary recovery against the Union.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should deny the petition for a writ of certiorari.

DATED: April ....., 1982

Respectfully submitted,

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Petitioner's Brief

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No. 81-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

BUILDING MATERIAL and DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al.,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, *Intervenors.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court below erred in upholding the National Labor Relations Board's requirement that actual coercion must have been used to enforce a voluntary "hot cargo" agreement before a "make-whole" remedy was appropriate for a violation of Section 8(e) of the Labor-Management Relations Act.

2. Whether the Court below erred in enforcing the National Labor Relations Board's Order denying the petitioner a "make-whole" remedy and allowing the respondent labor union to retain petitioner's initiation fees, dues and fringe benefit contributions obtained through the enforcement of a "hot cargo" agreement prohibited by Section 8(e) of the Labor-Management Relations Act.

PARTIES TO THE PROCEEDINGS BELOW

To date, the parties to these proceedings have been:

LARRY SHEPARD

THE NATIONAL LABOR RELATIONS BOARD

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC.

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION

ENGINEERING AND GENERAL CONTRACTORS ASSOCIATION

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No. 81-1627

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

CITATIONS TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at —— U.S.App.D.C. ——, 669 F.2d 759 (1981) and is reproduced as Appendix A to the Petition for Certiorari. The Decision and Order of the National Labor Relations Board is reported at 249 N.L.R.B. 386 (1980) and is reproduced as Appendix B to the Petition for Certiorari.

JURISDICTION

On December 4, 1981, the Court of Appeals for the District of Columbia Circuit issued its opinion denying the consolidated petitions for review and enforcing the Order of the National Labor Relations Board. Judgment was entered that same day. On March 3, 1982, Larry Shepard filed his Petition for Writ of Certiorari which was granted May 17, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

The statute involved is the Labor-Management Relations Act ("Act"), as amended, 29 U.S.C. § 141 *et seq.* (1976). The relevant sections of the Act are

§ 8(b)(4)(ii)(A)(B)	29 U.S.C. § 158(b)(4)(ii)(A)(B)
§ 8(e)	29 U.S.C. § 158(e)
§ 10(a) and (c)	29 U.S.C. § 160(a) and (c)
§ 303	29 U.S.C. § 187

They provide in pertinent part:

§ 8 Unfair labor practices

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

(A) forcing or requiring any self-employed person to join any labor . . . organization or

to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person . . . to cease doing business with any other person . . . .

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or . . . agrees to . . . cease doing business with any other person, and any contract or agreement entered into . . . shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work: . . .

* * * *

§ 10 Prevention of unfair labor practices

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . ..

* * * *

(c) . . . If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue . . . an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative ac-*

tion . . . as will effectuate the policies of the [*Act*] . . . . (Emphasis supplied).

* * * *

§ 303 Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for purposes of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section [8(b)(4)].

(b) Whoever shall be injured in his business or property by reason or [sic][1] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the costs of the suit.

STATEMENT OF THE CASE[2]

Introduction

The facts of the case are not in dispute.

The petitioner is a small, independent businessman who became involved in a long-standing labor dispute

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[1] So in the original: Public Law 80-101, June 23, 1947, c. 120, Title III, § 303(b), 61 Stat. 159. Probably should read "of."

[2] Record references will use the following format: "P.A." refers to the Appendix to the Petition for Writ of Certiorari; "J.A." refers to the Joint Appendix; "GC Ex. ;" refers to General Counsel Exhibit Number; "A." refers to the Appendix to this Brief.

between the Union,[3] various Contractor Associations,[4] and an association of independent dump truck owner-operators—the California Dump Truck Owners Association ("CDTOA").

The 1977-80 Master Labor Agreement ("MLA") for San Diego County, California between the Union and the Contractor Associations contained illegal "hot cargo" provisions requiring that the petitioner—and other independent contractors—join the Union or be barred from hauling materials to construction sites in the County (GC Ex #9, MLA §§ 4, 12, 42, J.A. 9-16). To avoid going out of business, the petitioner financially supported (under protest) the Union through payments of initiation fees and monthly dues. Additionally, fringe benefit payments were deducted from petitioner's gross receipts and paid to various Union benefit funds (*Id.*, MLA § 45, J.A. 17).

The petitioner filed unfair labor practice charges with the National Labor Relations Board ("Board") and, after a hearing, the Board held that the "hot cargo" provisions were unlawful. The Board issued a cease and desist order but denied the petitioner a "make-whole" remedy—thus allowing the Union to retain the benefits it received in enforcing the unlawful "hot cargo" provision.

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[3] Building Material and Dump Truck Drivers, Teamsters Local No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[4] Associated General Contractors of America, San Diego Chapter, Inc.; San Diego Building Contractors Association; Engineering and General Contractors Association.

The issue before this Court is whether the Board Order—denying a "make-whole" remedy—effectuates the policies of the Act.

History of the Labor Dispute

For over a decade the CDTOA and various California Teamsters unions waged a legal battle over the "employment" status of the dump truck owner-operators[5] (J.A. 109-110). Were they "employees" of the contractors who used their services or were they "independent contractors"? The issue was critical for if they were "employees," they had to comply with the union-security provisions of the MLA or lose their jobs. In 1973, the Board held that they were "employees," *Associated General Contractors,* 201 N.L.R.B. 311 (1973), but the legal battle continued.[6]

In June of 1977, the Contractors Associations and the Union entered into a new MLA covering San Diego County. This agreement specifically provided that "[t]he Owner-Operator shall be carried on the payroll of the Contractor as an *employee* and, as such,

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[5] The Teamsters unions involved in the construction industry have divided the State of California into three areas—Northern California, Southern California, and San Diego County—governed by separate Master Labor Agreements negotiated with contractor associations.

[6] *Teamsters Local 36 (Griffith Co.),* 173 N.L.R.B. 348 (1968); *Joint Council of Teamsters No. 42* v. *N.L.R.B.,* 450 F.2d 1322 (D.C. Cir. 1971); *Associated General Contractors (A. R. Kramer),* 201 N.L.R.B. 311 (1973), *vacated,* 233 N.L.R.B. 686 (1978); *Associated General Contractors,* 209 N.L.R.B. 363 (1974); *Associated General Contractors,* 220 N.L.R.B. 540 (1975), *reversed,* 564 F.2d 271 (9th Cir. 1977), NLRB Supplemental Decision, 239 N.L.R.B. 686 (1978).

all the terms and conditions of this Master Agreement . . . shall be applicable to him . . . ." (GC Ex #9, MLA § 42.B.4, J.A. 12) (emphasis supplied).

In October of 1977, in other litigation over the employment status of dump truck owner-operators covered by the Southern California MLA, the Ninth Circuit reversed the Board and held that they were independent contractors and not employees, *Associated General Contractors* v. *N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977), *reversing,* 220 N.L.R.B. 540 (1975). Following this decision, the CDTOA filed unfair labor practice charges alleging that the similar owner-operator provisions of the San Diego MLA violated the "hot cargo" prohibitions of the Act (J.A. 18).

The petitioner become involved in the dispute in 1978. Following his retirement from the United States Navy, he made a down payment on a truck-tractor, leased a dump-trailer, and went into business hauling sand, gravel and other building materials to various construction sites in San Diego County, California. He went into business as an independent contractor and was neither a member of the Teamsters union (J.A. 81, 87) nor the CDTOA.

It is a general practice in the California construction industry for building contractors to hire dump truck owner-operators on a day-to-day or task basis through truck *"brokers"* who refer owner-operators to jobs. These brokers, who are licensed by the California Public Utilities Commission, execute "sub-haul" agreements with the owner-operators and charge them a five percent fee for obtaining jobs for them (P.A. 30a-31a). It is also a common practice for the owner-operators to execute sub-haul agreements with more

than one broker to maximize the chances of a job referral. The petitioner followed these general practices (J.A. 84-87).

In February of 1978, the petitioner executed a non-exclusive sub-haul agreement with Terra Trucking Company, a broker of truck services (J.A. 83-84; GC Ex #3, J.A. 19). Additionally, he leased his dump-trailer from the Broker for an additional twenty percent fee (J.A. 85; GC Ex #4, J.A. 23). Petitioner's Broker—while working as an owner-operator in 1974—had executed a Short Form Agreement with the Union agreeing to be bound by all terms of the San Diego MLA (J.A. 61; GC Ex #7, J.A. 5). Since the Broker had never cancelled his agreement with the Union, he was bound by the *new* owner-operator provisions of the 1977-80 MLA. Under the terms of that agreement, the owner-operators he referred to jobs covered by the MLA were his "employees;" and as his employees, required to comply with the Union Shop provisions of the MLA or be fired.

Pursuant to the Fringe Benefit provisions of the MLA, the Broker made monthly payments and reports to the Teamsters benefit funds for all "union" jobs worked by the petitioner (J.A. 65-71; Union Ex #1, J.A. 26; GC Ex #9, MLA §§ 42S, 42T, 42U and 45, J.A. 14-17).

In August of 1978, the Union sent petitioner's Broker a letter stating that certain owner-operators, including the petitioner, were not "members in good standing" as required by the MLA. The letter demanded that these owner-operators be denied work until cleared by the Union (J.A. 56-57, 87-88; GC Ex #6, J.A. 27). The broker held a meeting with these

owner-operators and informed them that if they did not join the Union he would stop brokering their services and "pull the pin" on their leased trailers (J.A. 57). In order to stay in business, and on advice of counsel, the petitioner and some of the other owner-operators joined the Union under protest (J.A. 87-89). They paid initiation fees, union dues and, indirectly, benefit fund payments (J.A. 89).

Administrative and Judicial Proceedings

On August 25, 1978, counsel for the petitioner filed unfair labor practice charges on behalf of the Broker's non-union owner-operators alleging violations of section 8(b)(4) of the Act—the secondary boycott prohibitions. The Board's Regional Director requested that these charges be withdrawn[7] and replaced by charges alleging a violation of section 8(e) of the Act—the "hot cargo" prohibition. The petitioner complied (J.A. 28).

On December 8, 1978, following a 1977 reversal by the Ninth Circuit, the Board issued its Supplemental Decision on the Southern California MLA, holding that the owner-operators were "independent contractors" and not "employees" covered by the Act. *Associated General Contractors,* 239 N.L.R.B. 686 (1978). Following this Board Decision, the Regional Director consolidated the unfair labor practice charges of the peti-

[7] A formal complaint was not issued on these charges and they are *not* a part of the certified record before the Court. They are mentioned here only to apprise the Court of all pertinent proceedings. Copies of the pertinent charges and letters were contained in the Appendix to petitioner's Reply Brief to the Court of Appeals.

tioner and CDTOA, and issued a consolidated complaint alleging that portions of the San Diego MLA violated the "hot cargo" prohibitions of the Act (J.A. 29-36).

Additionally, pursuant to section 10(1) of the Act, the Board sought and obtained a federal court injunction prohibiting further enforcement of the challenged provisions of the MLA. *Johanson* v. *Building Material and Dump Truck Drivers, Teamsters Local 36,* Southern District of California, Case No. 79-0086-E.

Finally, eight months after the petitioner filed his unfair labor practice charges, he was free to cease paying dues and fringe benefits to the Union. There was similar Board litigation over the owner-operator provisions of the Southern California MLA, but the petitioner was not involved in that case. *Joint Council of Teamsters No. 42,* 248 N.L.R.B. 808 (1980).

The matter was tried before an Administrative Law Judge ("ALJ"), who found that the owner-operators were *not* employees but independent contractors and that the challenged provisions violated the "hot cargo" prohibitions of the Act by providing that the Contractor Associations' members cease, or refrain from, doing business with non-union owner-operators (P.A. 30a-43a). In addition to a narrow cease-and-desist order, the ALJ ordered the Union and the Contractor Associations, jointly and severally, to "make-whole" the owner-operators for their compulsory payment of initiation fees, dues and the contributions made on their behalf (deducted from their gross receipts) to the Union benefit funds (P.A. 43a-44a).

Exceptions were taken, and the matter was submitted to the Board. In 1980, the Board upheld the ALJ but

expressly deleted his proposed "make-whole" reimbursement order because:

(1) There was no evidence that the Union coerced the owner-operators into joining the Union, and

(2) such orders, which "were typically used to 'make-whole' *employees* for violations of the Act, [were] generally overbroad and inappropriate in the context of 8(e) violations."

(P.A. 16a-17a n.2) (emphasis in original).

Additionally, the Board noted that the aggrieved owner-operators—because they were independent contractors—could pursue a damage claim under section 303 of the Act. Accordingly, the Board held that the reimbursement order would not effectuate the remedial policies of the Act, *Id.* The Board entered a similar decision in its case involving the Southern California MLA, *Joint Council of Teamsters No. 42, supra.*

The Union petitioned for review in the United States Court of Appeals for the District of Columbia Circuit while the petitioner and CDTOA sought review in the Ninth Circuit. The Board cross-petitioned for enforcement of its Order. The District of Columbia Circuit heard the "race-to-the-courthouse" battles involving both the San Diego MLA and the Southern California MLA cases. It retained the San Diego MLA case and transferred the Southern California MLA case to the Ninth Circuit.[8]

[8] A portion of that case had previously been before the Ninth Circuit in 1977, when the Court reversed the Board's prior ruling that the dump truck owner-operators were employees, *Associated General Contractors* v. *N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977).

On December 4, 1981, the District of Columbia Circuit enforced the Board's Order in all respects. The court held that in the absence of allegations and proof of coercion to enforce the "hot cargo" agreements, "the Board [could] properly find it inappropriate to order reimbursement of sums paid pursuant to agreements that violate section 8(e)" (P.A. 13a). The Court, after noting that the Board's remedial power was "a broad discretionary one, subject to limited judicial review," upheld the Board's denial of a "make-whole" remedy (P.A. 11a-14a).

Two weeks later, the Ninth Circuit issued its ruling concerning the Southern California MLA. *Joint Council of Teamsters No. 42* v. *N.L.R.B.*, 671 F.2d 305 (9th Cir. 1981) (P.A. 45a-54a). The Ninth Circuit enforced the Board's Order regarding the "hot cargo" violations, but remanded the case to the Board to "fashion a make-whole remedy or to show cause why a make-whole remedy would not effectuate the purposes of the Act," *Id.* at 312-313 (P.A. 54a).

On March 3, 1982, the petitioner sought a writ of certiorari which was granted on May 17, 1982.

SUMMARY OF THE ARGUMENT

The petitioner challenges the Board's denial of a "make-whole" remedy. While acknowledging that the Board has broad discretion in fashioning remedies, those remedies must effectuate the policies of the Act. *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533 (1943). The Board's cease-and-desist remedy—without a reimbursement order—does not effectuate the policies of the Act.

The Board's stated reasons for denying a "make-whole" remedy do not withstand close scrutiny:

1. The Board's requirement that a party damaged by a *voluntary* hot cargo agreement must prove *actual coercion* before he is entitled to a "make-whole" remedy, defeats the intent of Congress when it enacted the hot cargo prohibitions of § 8(e). *Coercive* boycotts are made illegal by § 8(b)(4) and require proof of coercion. However, the prohibition on agreements to *voluntarily* boycott a third party are contained in § 8(e) and do not require proof of *actual coercion.* The relevant inquiry for a "make-whole" remedy is not whether there was coercion but whether the third party was damaged by the "enforcement" of the illegal agreement.

2. Absent some rational grounds for not doing so, the Board should order a refund of money collected illegally. *Acco Construction Equipment, Inc.* v. *NLRB,* 511 F.2d 848 (9th Cir. 1975). In similar or analogous situations, the Board has required "make-whole" remedies, *see e.g., Teamsters Local 814 (Santini Brothers),* 208 N.L.R.B. 184 (1974) (reimbursement appropriate where contractor required independent truck owner-operators to join the union or he would cease using their services); *Sheraton-Kauai Corp.,* 177 N.L.R.B. 25 (1969) (reimbursement appropriate where union-security agreement unlawfully extended to cover other employees), and its unexplained failure to follow these precedents was error.

3. The Board's concern that a "make-whole" remedy would be punitive is misplaced. Where membership in the union was shown to be influenced or compelled by reason of the unfair labor practice, an

order requiring the Union to return all dues and fees unlawfully collected "dissipates" one of the "consequences" of the violation. *Carpenters Local 60* v. *NLRB*, 365 U.S. 651 (1961).

Finally, the Board's reliance on petitioner obtaining complete relief in a civil damage suit under § 303 of the Act is improper. First, the Board has the statutory duty to remedy unfair labor practices and cannot avoid this duty by directing injured parties to other possible forums. Second, a civil damage suit is neither available nor practical. Section 303 of the Act is a jurisdictional statute and by its express terms is limited to suits against labor unions for damages from *coercive* secondary boycotts. Neither the statutory language nor its legislative history support the Board's *assumption* that the petitioner could obtain relief through a civil damage suit.

Since the Board's reasons for denying a "make-whole" remedy are erroneous, it should be directed to fashion a remedy to effectuate the policies of the Act, i.e. make the petitioner whole.

ARGUMENT

The petitioner challenges the Board's denial of a "make-whole" remedy. A reimbursement (make-whole) order would have required the Union and the Contractor Associations to reimburse him for the initiation fees, dues, and fringe benefit contributions he was required to pay when they enforced their illegal hot cargo agreement. Although the Board ordered them to cease-and-desist from enforcing the hot cargo agreement, it deleted the ALJ's reimbursement order and allowed the wrongdoers to retain the benefits of their illegal agreement.

The Court of Appeals declined to disturb the Board's order reasoning that since the case did not involve a *coercive* secondary boycott, a "make-whole" remedy would be punitive and beyond the remedial powers of the Board in the context of a *voluntary,* albeit illegal, hot cargo agreement.

In holding that a reimbursement order would not effectuate the *remedial* policies of the Act, the Board (with Court of Appeals approval) relied upon three factors:

(1) there was insufficient evidence that the owner-operators' financial losses were directly attributable to *actual coercion* by the Union and Contractor Associations;

(2) that reimbursement orders (typically used to "make-whole" *employees*) were generally overbroad and inappropriate in the context of § 8(e) violations; and

(3) that the aggrieved owner-operators could pursue a damage claim under § 303 of the Act.

The petitioner will demonstrate that the Board's reliance on any or all of these reasons was inappropriate.

I. WITHOUT A MAKE-WHOLE REMEDY, THE ORDER OF THE BOARD DOES NOT EFFECTUATE THE POLICIES OF THE ACT.

A. Although The Board Has Broad Discretion In Fashioning Remedies, The Remedies Must Effectuate The Policies Of The Act.

At the outset, the petitioner acknowledges that the "Board has broad discretion to adapt its remedies to

the needs of particular situations," *Carpenters Local 60* v. *NLRB*, 365 U.S. 651, 655 (1961), and, within the limits set forth in the Act, Congress has given it a relatively free hand and broad discretion in determining which remedy will best effectuate the policies of the Act. *Fibreboard Paper Products Co.* v. *NLRB*, 379 U.S. 203, 216 (1964).

While recognizing that there is a strong policy favoring deferral to the Board's expertise in fashioning appropriate remedies, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941), the Court has not required either the parties or the courts to place blind trust in the Board's decisions. The Board's authority is limited by the statutory requirement that its order must consist only of that "which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

The *policies* which the Board is directed to effectuate are broadly stated in § 1 of the Act and provide in pertinent part:

> It is hereby declared to be the policy of the United States to . . . mitigate and eliminate . . . [obstructions to the freeflow of commerce] . . . when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976). *Cf. NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In construing these

broad statutory objectives and purposes, the Court held that "[t]he Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is the freedom to contract." *H. K. Porter* v. *NLRB,* 397 U.S. 99, 108 (1979).

Board remedies, therefore, must accord with and further these statutory objectives. Conversely, the Board's remedies must not be in conflict with any of these statutory objectives or attempt to achieve ends other than those set forth in the statute.

It is petitioner's position that the Board's denial of a "make-whole" remedy—because there was insufficient evidence of *actual coercion*—conflicts with the intent of Congress to make *voluntary* hot cargo agreements illegal. Additionally, the denial of a "make-whole" remedy interferes with petitioner's freedom to contract in that it required him to pay initiation fees, union dues, and fringe benefit contributions, even though he never bargained for or agreed to such contract terms.

B. Actual Coercion Is Not An Element Of An 8(e) Violation And Should Not Be A Prerequisite For Complete Relief.

The Board order, by requiring evidence of *actual coercion* before granting a "make-whole" remedy for a hot cargo violation, emasculates the statute.

The legislative history of § 8(e), and this Court's holdings have made it abundantly clear that § 8(e) was adopted to close the "voluntary agreement" loophole in the secondary boycott prohibitions of the Act.

See e.g., National Woodwork Mfrs Ass'n v. *NLRB*, 386 U.S. 612, 633-634 (1967); *Kaiser Steel Corp.* v. *Mullins*, —— U.S. ——, 102 S. Ct. 851, 859 (1982).

The original secondary boycott prohibitions were added to the Act in 1947[9] and codified as § 8(b)(4).[10] Various "loopholes" in these secondary boycott prohibitions were found during the next decade. In *Carpenters' Local 1976* v. *NLRB (Sand Door)*, 357 U.S. 93 (1958), the Court stated:

> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in § 8(b)(4)(A) [now § 8(b)(4)(B)]. The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . . Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited. *A boycott voluntarily engaged in by a secondary employer . . . is not covered by the statute.* Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees.

Id. at 98-99 (emphasis supplied).

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[9] Pub. L. 80-101, 61 Stat. 136 (1947).

[10] On adjacent pages of the Appendix to this Brief are pertinent provisions of the Labor-Management Relations Act as they existed in 1947 and after they were amended in 1959. Citations to the legislative history of the 1959 amendments will refer to pages of *The Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (Leg. Hist.) prepared by the National Labor Relations Board.

The Court's holding in *Sand Door* established that the *mere execution* of a hot cargo agreement was not prima facie evidence of prohibited inducement of employees. The Court emphasized that the 1947 language of § 8(b)(4)(A) could not support a conclusion that all hot cargo agreements were contrary to public policy. The Court stated "[i]t is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted." *Id.* at 100.

Congress did not take long in providing legislative guidance on the legality of *voluntary* hot cargo agreements. The next year, Congress passed the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act,[11] and made *voluntary* hot cargo agreements an unfair labor practice by adding § 8(e) to the Act.[12] (A. 7a).

Section 8(e) contains no reference to "coercion" because *coercive* secondary boycotts were already illegal under § 8(b)(4). See A. 2a-5a. The purpose of the § 8(e) addition was to make agreements to conduct *voluntary* secondary boycotts illegal. The Board's order defeats this purpose by requiring that *actual coercion* be established. Although the Board has broad discretion in determining appropriate remedies, it does not have the authority to rewrite the statute.

The petitioner has alleged and proved that he was damaged when a *voluntary* hot cargo agreement was

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[11] Pub. L. 86-257, 73 Stat. 519 (1959).

[12] Provisos to § 8(e) protect hot cargo agreements in the construction and garment industries, but those provisos are not at issue in this case.

enforced against him. The statute does *not* require that he also allege and prove that he was injured by a *coercive* secondary boycott, before he can recover his damages from the illegal *voluntary* agreement.

Petitioner concedes that there is a considerable body of case law holding that "coercion" is required before the Board has the authority to issue a "make-whole" remedy. *See, e.g., Carpenters Local 60* v. *NLRB, supra*; *Teamsters Local 357* v. *NLRB,* 365 U.S. 667 (1961); *Sheraton-Kauai Corp.* v. *NLRB,* 429 F.2d 1352, 1357-1358 (9th Cir. 1970). However, these cases all involve, *inter alia,* violations of either § 8(a)(1) (unfair labor practice for an employer to interfere with, restrain, or coerce employees) or § 8(b)(1)(A) (unfair labor practice for a union to restrain or coerce employees). Accordingly, in those cases the courts required that some form of restraint or coercion be proved before a "make-whole" order was appropriate. *Carpenters Local 60* v. *NLRB, supra,* 365 U.S. at 654-55 (1961). Since § 8(e) is an *independent* unfair labor practice *not linked* to the other unfair labor practice provisions of § 8(a) or § 8(b), little or no weight should be given to the "coercion" requirement discussed in those cases.

Section 8(e) deals with agreements to *voluntarily* boycott a third party. The relevant inquiry for a "make-whole" remedy is not whether there was coercion but whether the third party was damaged by the *"enforcement"* of the illegal agreement. Under this standard, the mere execution of an agreement violative of § 8(e) would not give rise to a "make-whole" remedy. The injured parties would have to demonstrate that *but for the existence and enforcement* of the illegal agreement, they would not have been damaged. Such a standard allows the third-party

victims to obtain complete relief (i.e. a cease-and-desist order with or without a reimbursement order) while ensuring that the Board order is not *punitive.*

In *Joint Council of Teamsters No. 42* v. *NLRB,* 671 F.2d 305 (9th Cir. 1981) (P.A. 45a-54a), the Ninth Circuit in discussing a "make-whole" remedy for the enforcement of the identical hot cargo agreement under the Southern California MLA, stated:

> We reject the Board's reasoning that the purposes of the Act are effectuated by reimbursement for violation of 8(b)(4), but not for violations of § 8(e). To be sure, reimbursement is inappropriate in the absence of coercion. (Citations and footnotes omitted.) *But when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation.* [The "hot cargo" provision] presented the truck owners with the grim choice of joining the union or foregoing work with the signatory employers. Although the unions may not have employed coercive tactics, violative of § 8(b)(4), the inclusion of [the "hot cargo" provisions] in the collective bargaining agreement would necessarily have had the effect of coercing reluctant truck owners to join the union.

671 F.2d at 310-11; P.A. at 50a-51a (emphasis supplied).

It is respectfully submitted that the Board erred in requiring *actual coercion* as a prerequisite for a "make-whole" remedy for a hot cargo violation.[13]

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[13] Should this Court decide that the Board is correct in requiring *actual coercion* before a "make-whole" remedy is appropriate, the undisputed facts of this case satisfy that requirement. The ALJ, in his findings of fact, found that the petitioner "joined the Union

C. Reimbursement Orders Are Not Generally Overbroad In The Context Of An 8(e) Violation.

In its Decision, the Board stated "[f]urthermore, we find a reimbursement order, typically used to 'make-whole' *employees* for violations of the Act to be generally overbroad and inappropriate in the context of 8(e) violations." *Building Material and Dump Truck Drivers, Local 36,* 249 N.L.R.B. 386 n.2 (1980) (P.A. 17a). The Board used this identical language and rationale in its decision on the Southern California MLA. *Joint Counsel of Teamsters No. 42,* 248 N.L.R.B. 808, 817 n.34 (1980). On petitions for review, the District of Columbia Circuit enforced the Board's order without discussion of this issue while the Ninth Circuit refused to accept the Board's reasoning. *Joint Council of Teamsters No. 42* v. *NLRB, supra,* 671 F.2d at 310-312, P.A. 50a-54a.

In discussing the Board's attempted distinction between reimbursement orders for *employees* and other parties, the Ninth Circuit stated:

> [w]e note that the Board has also ordered reimbursements for employers and independent contractors when to do so would effectuate the policies of the Act. *See, e.g., Graphic Arts International Union Local 280,* 235 N.L.R.B. 1084, 1085 (1978), *enforced,* 526 F.2d 904 (9th Cir. 1979) (employer); *Teamsters Local 814 (Santini Brothers),* 208

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because of the letter Local 36 sent [to his broker]. (G.C. Ex. 6)" . . . and that he "joined and paid his dues under protest." (P.A. 29a-30a). The Union did *not* except to this finding and it was not an issue before the Board. It is therefore undisputed that the petitioner joined the union under protest *and because the unlawful hot cargo agreement was being enforced against him.* If coercion is a necessary prerequisite for a "make-whole" remedy, it is respectfully submitted that the petitioner has satisfied such a requirement.

N.L.R.B. 184 (1974), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818 (1977) (independent contractors).

Id. at 312, P.A. at 54a.

One other factor should be noted. The damages occurred because the Union and the Contractor Associations agreed that owner-operators would be *treated as employees* even though the "employee" or "independent contractor" issue was being litigated at the time. In order to stay in business, the owner-operators were forced to *act as employees* and pay initiation fees, dues and fringe benefit contributions. Then, after prevailing on the "employee" or "independent contractor" issue, the owner-operators were met with the Board's "Catch-22" logic—you cannot recover your damages because you were *not* employees! The critical point is not their actual employment status, but the fact that the damages occurred because they were *illegally treated as employees.*

The *effects* of the present illegal hot cargo agreement are very similar to unfair labor practice cases involving illegal union-security clauses or illegal employer domination or assistance to a union. In those instances, the Board has consistently ordered reimbursement of illegally extracted monies. *See, e.g., Carpenters Local 60* v. *NLRB, supra*; *Virginia Electric & Power Co.* v. *NLRB, supra. NLRB* v. *Booth Services, Inc.*, 516 F.2d 949 (5th Cir. 1975); *NLRB* v. *Hi-Temp, Inc.*, 503 F.2d 583 (7th Cir. 1974); *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352 (9th Cir. 1970).

The other portion of the Board's rationale—a reimbursement order would be overbroad and inappropriate in the context of a § 8(e) violation—is also faulty.

In discussing this issue in the Southern California MLA case, the Ninth Circuit reiterated its position that "where money has been collected illegally, the Board should order a refund, absent some rational grounds for not doing so. *See Acco Construction Equipment, Inc.* v. *NLRB,* 511 F.2d 848, 855 (9th Cir. 1975)." *Id.* at 311, P.A. at 49a. After noting that "the Board cannot arbitrarily impose different remedies in similar situations," the Court found that the Board's prior rulings in *Teamsters Local 814 (Santini Brothers), supra, and Sheraton-Kauai Corp.,* 177 N.L.R.B. 25 (1969), *enforced,* 429 F.2d 1352 (9th Cir. 1970), were controlling.

In *Sheraton-Kauai Corp.,* 177 N.L.R.B. 25 (1969), *enforced,* 429 F.2d 1352 (9th Cir. 1970), a company and its union extended their existing state-wide collective bargaining agreement, which contained a union-security clause, to a newly established location. The Board found that the extension was improper, and ordered the employer and the union to reimburse employees for union initiation fees and dues. Enforcing the order, the Ninth Circuit held that

> [t]he Board's approach effectuates the policy of the Act, for it 'returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company [and Union] whose unfair labor practices brought about the situation.'

Id. at 1358, *quoting Virginia Electric & Power Co.* v. *NLRB, supra,* 319 U.S. at 541 (1943).

In *Teamsters Local 814 (Santini Brothers),* 208 N.L.R.B. 184 (1974), *remanded for clarification,* 512 F.2d 564 (D.C. Cir. 1975), *order affirmed,* 223 N.L.R.B. 752 (1976), *enforced,* 546 F.2d 989 (D.C. Cir. 1976),

cert. denied, 434 U.S. 818 (1977), the Board (without comment) adopted an ALJ's reimbursement order in a case almost identical to the case at bar. In both cases, a Teamsters local union attempted to impose unionization on independent contractor owner-operators by pressure exerted through employer signatories to its labor contract. In both cases, the union and the employers entered into agreements which, as enforced, forbade the employers from using the services of non-union owner-operators. In both cases, the employers advised the owner-operators that their services could not be used unless they joined the union, and in both cases some owner-operators joined in response to those pressures.

The only factual difference between the cases is that there was a brief (one-day) strike against Santini Brothers before it signed the agreement requiring the owner-operators to join the union, while petitioner's broker was not coerced into signing the MLA. Accordingly, the Board's complaint in *Santini* alleged violations of both § 8(e) and § 8(b)(4)(A) (coercing an employer into entering an 8(e) agreement). In *Santini,* the Board ordered the union to reimburse the owner-operators "for all initiation fees, dues or monies each may have been required to pay to the Union by reason of enforcement" of the illegal hot cargo agreement. 208 N.L.R.B. at 202.

The fact that the union violated § 8(b)(4) by coercing Santini Brothers into signing the illegal hot cargo agreement is irrelevant to the issue of whether the *victims* of that agreement should be "made-whole." The remedy for the victims of hot cargo violations should not be linked to other parties' possible remedies for secondary boycott violations.

The petitioner agrees with the Ninth Circuit when it held that these two cases were controlling and that the Board should have ordered a "make-whole" violation.

In summary, the petitioner has demonstrated that the Board's denial of a "make-whole" remedy does *not* effectuate the policies of the Act. In its decision, the Board opined that the petitioner, as an independent contractor, could pursue a damage claim under § 303. Even if a § 303 remedy was available, the possibility of an alternate remedy does not relieve the Board of its statutory obligation to remedy unfair labor practices. This it has failed to do.

D. A Make-Whole Remedy For Damages From A Hot Cargo Violation Is Remedial And Not Punitive.

The Court of Appeals declined to disturb the Board's order, reasoning that since the case did not involve a *coercive* secondary boycott, a "make-whole" remedy would be punitive and beyond the remedial powers of the Board. This remedial-punitive distinction is not always clear and this Court had occasion to decline to enter into what it called "the bog of logomachy . . . by debate about what is 'remedial' and what is 'punitive.'" *NLRB* v. *Seven-Up Bottling Company,* 344 U.S. 344, 348 (1953).

Notwithstanding this Court's reluctance to enter the "bog," the Court of Appeals decision requires a response. The case law does, however, provide some guidance on the issue. For example, in *NLRB* v. *Coats & Clark, Inc.,* 241 F.2d 556 (5th Cir. 1957), the Fifth Circuit established a two-pronged test to determine whether a Board order was remedial or punitive:

1) does the Board order make someone whole for injuries resulting from a violation of the Act; or

2) does the Board order prevent the violator from benefitting from his misdeed.

Id. at 561. If either of these criteria is satisfied, the order is not punitive.

Under either prong of this test a "make-whole" remedy for the petitioner is appropriate. First, the petitioner has been financially damaged as a result of the illegal hot cargo agreement. Without a "make-whole" remedy he remains damaged. Second, as the Board's order presently stands, the parties to the hot cargo agreement retain the benefits of this illegal agreement. If a "make-whole" order is not issued, the violators continue to benefit from their wrongdoing. If the Board had entered a "make-whole" remedy in this case, under the Fifth Circuit's test it would not have been punitive.

In *Carpenters Local 60* v. *NLRB, supra,* this Court summarized the criteria for determining when a Board's order was remedial or punitive. The Court stated:

> the power of the Board 'to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.' *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 236 (1938). Where no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice, no 'consequences of violation' are removed by the order

> compelling the union to return all dues and fees collected from its members; and no 'dissipation' of the effects of the prohibited action is achieved. *NLRB* v. *United Mine Workers, District 50*, 355 U.S. 453, 463 (1958).

365 U.S. at 655.

Applying the *Carpenters Local 60* criteria, it is obvious that a "make-whole" order would not be punitive. The petitioner's payment of union initiation fees, dues and benefit contributions was clearly "influenced or compelled" by the existence of an illegal hot cargo agreement. The return of these dues, fees and benefit contributions would, therefore, "remove one consequence" of this unfair labor practice.

Accordingly, the Court of Appeals' reliance on the remedial-punitive distinction was misplaced.

II. THE ALTERNATIVE REMEDY SUGGESTED BY THE BOARD—A CIVIL SUIT UNDER SECTION 303 OF THE ACT—IS NEITHER AVAILABLE NOR PRACTICAL, LEAVING THE PETITIONER WITHOUT AN EFFECTIVE REMEDY.

One of the Board's stated reasons for denying the petitioner a "make-whole" remedy was its belief that the "aggrieved owner-operators engaged in business as independent contractors [could] pursue a damage claim under Section 303 of the Act." 249 N.L.R.B. 386 (1980) (P.A. 17a). Section 303 provides in pertinent part that:

> (a) It shall be unlawful . . . for any labor organization to engage in any activity or conduct defined as an *unfair labor practice in section [8(b)(4)]*.

> (b) Whoever shall be injured in his business or property *by reason of any violation of subsection (a)* of this section may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the costs of the suit.

29 U.S.C. § 187 (1976) (emphasis supplied).

On its face, this section provides for a civil suit for violations of the "secondary boycott" prohibitions of the Act and does *not* provide the courts with jurisdiction for civil suits for violation of the "hot cargo" prohibitions of the Act. It is respectfully submitted that the Board was wrong in *assuming* that a § 303 suit was available.

A. Section 303 Provides Federal And State Courts With Only "Limited" Jurisdiction, And That Jurisdiction Does Not Extend To Civil Suits For Violation Of Section 8(e) Of The Act.

Under § 10(a) of the Act, the Board is vested with primary jurisdiction to determine what is or is not an unfair labor practice. Additionally, under Section 10(c) of the Act, the Board is charged with the exclusive authority to provide affirmative remedies for unfair labor practices. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). And, as a general rule, federal and state courts do *not* have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [Act]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). *See also Garner* v. *Teamsters*, 346 U.S. 485, 490-491 (1953).

The 1947 amendments to the Act provided federal courts with jurisdiction over certain *specified* areas of labor law.[14] Section 303 was added to the Act to ensure that the victims of illegal secondary boycotts could obtain complete relief, including consequential damages.

During the Senate debates, the following dialogue took place between Senator Ellender and Senator Taft (one the Bill's co-sponsors):

> *Mr. Ellender:* Mr. President, as I understand, the Senator's amendment does not in any wise affect the injunctive process provided for in the pending bill, but simply provides an *additional remedy* by way of suits for damages.
>
> *Mr. Taft:* The Senator is correct. We considered making it a procedure through the National Labor Relations Board also, *but it is not felt* I think by any of those on the other side of these questions *that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that that particular function should be in the Board.* So, if such a remedy is to be provided at all, if there is to be any *recourse for financial losses caused by unions, it must be by direct suit,* as proposed by the amendment.

93 Cong. Rec. 4858 (1947) (statements of Sen. Ellender and Taft) (emphasis supplied), *reprinted in* Legislative History of the Labor-Management Relations Act, 1947, at 1371 (1974).

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[14] In addition to § 303, the Act added § 301 providing for civil suits for violations of collective bargaining agreements between employers and unions (29 U.S.C. § 185); and § 302(e) restoring federal jurisdiction to enjoin certain enumerated financial transactions between employers and unions (29 U.S.C. § 186(e)).

Senator Taft's explanation of § 303 indicates that the calculation of consequential damages was not regarded as being within the Board's special expertise. To the contrary, the assessment of consequential damages had always been regarded as a traditional function of the courts. The enactment of § 303 did no more than ensure that victims of a union's illegal secondary activity had a forum with the necessary powers and skills to compensate them.

Congress did *not,* however, make § 303 the *exclusive* means for obtaining relief from an illegal secondary boycott. Under the amended Act, the victims of an unlawful secondary boycott had a *choice of forums* and the determination of whether a union's conduct violated § 8(b)(4) could be made either by the Board (in an unfair labor practice case), by a district court (in a suit under § 303), or by both. *International Longshoremen's & Warehousemen's Union* v. *Junlar Spruce Corp.,* 342 U.S. 237, 243-45 (1952); *Plumbers Local 761* v. *Matt J. Zaich Const. Co.,* 418 F.2d 1054, 1057-58 (9th Cir. 1969); *Mead* v. *Retail Clerks Local 839,* 523 F.2d 1371 (9th Cir. 1975).

In 1959, following the Court's decision in *Sand Door,* and the McClellan Committee Hearings, Congress amended the secondary boycott prohibitions of the Act and added § 8(e) making it an unfair labor practice to enter into a *voluntary* hot cargo agreement. See discussion in part I.B of this Brief, *supra* at pages 17-19. Although § 303 was amended at the same time that § 8(e) was added to the Act, the § 303 amendment did not provide for a civil suit for violation of § 8(e). These amendments/additions concerning secondary boycotts, civil suits, and hot cargo agreements were contained in the same section of the amendments and

indicate that Congress considered and resolved all of these related issues at the same time (Pub. L. 86-257, § 704, 73 Stat. 542-545. Leg. Hist. 24-27). The failure to provide a civil damage remedy for violation of § 8(e) could hardly be considered an oversight.

(1) The Legislative History Of The 1959 Amendments To Section 303 Support A Narrow Construction Of The Scope Of Section 303 Jurisdiction.

As originally enacted in 1947, subparagraph (a) of § 303 reiterated the unfair labor practice provisions of Section 8(b)(4), and subparagraph (b) went on to authorize a civil damage suit by any person "injured in his business or property by reason of any violation of subsection (a) . . . ." (A. 10a, 12a). The 1959 amendments to § 303 replaced this cumbersome list with the simple statement that it was unlawful for any labor union to engage in "any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act, as amended." (A. 11a). The 1959 amendments did nothing more than simplify the statutory language and refer the reader back to the "secondary boycott" prohibitions of § 8(b)(4). Compare page 10a, 12a with 11a of the Appendix to this Brief.

In *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967), the Court held that "[t]he Landrum-Griffin amendments in 1959 were adopted only to close various loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and court decisions . . . [and] § 8(e) simply closed still another loophole." *Id.* at 633-634. Notwithstanding its concern over the "hot cargo" loophole, Congress chose not to amend § 303 to include a civil remedy for violations of the newly added "hot cargo" prohibition.

"The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive." *Consumer Products Safety Commission* v. *GTE Sylvania,* 447 U.S. 102, 108 (1980). Section 303 is a jurisdictional statute designed to provide for limited judicial interference in an area normally left to the exclusive jurisdiction of the Board. By its express terms, § 303 provides for a civil suit against a labor union *only* for violations of the secondary boycott prohibitions contained in § 8(b)(4). There is no ambiguity in the language. It does *not* provide for a civil action against a labor union or an employer for damages flowing from the enforcement of an illegal hot cargo agreement.

The legislative history of the 1959 amendments supports a narrow construction of the jurisdictional grant contained in § 303. The Bill finally passed by both Houses of Congress was only one of many such Bills considered during 1959.[15] Two Bills proposed that *other* unfair labor practices be subject to civil suit under § 303.

House of Representatives Bill 4474, introduced by Representative Barden on February 16, 1959, would have amended § 303 to provide for civil suits for both unlawful secondary boycotts and the imposition of excessive or discriminatory union initiation fees (§§ 8 (b)(4) and (5)). (A. 14a).

House of Representatives Bill 8400 (the original Landrum-Griffin proposal) was introduced on July 27,

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[15] Pertinent extracts from Bills which attempted to make *other* unfair labor practices subject to civil suit under § 303 are reproduced in the Appendix to this Brief, page 14a through 16a.

1959 and sought to alter § 303 to provide for civil suits for both unlawful secondary boycotts and unlawful organizational and recognitional picketing (§§ 8(b)(4) and (7)). (A. 15a). Although this proposed Bill contained a "hot cargo" prohibition, it did not propose to amend § 303 to provide for civil suits for hot cargo violations. Neither the proposals in H.R. 4474 nor H.R. 8400 became part of the final Act as passed by Congress.

Additionally, House of Representatives Bill 7265, introduced by Representative Kearns, would have made the entry into a hot cargo agreement an unfair labor practice for *both* employers and labor unions. It was made applicable to labor unions by the addition of § 8(b)(4)(iii) and to employers by the addition of § 8(a)(6). (A. 15a-16a). The bill made no provisions to amend § 303.[16]

The petitioner's contention that the jurisdictional grant in § 303 should be narrowly construed is further supported by the section-by-section analysis of the Landrum-Griffin Act made by the staff of the Senate's Subcommittee on Labor. STAFF OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 86TH CONG., 1ST SESS., SECTION-BY-SECTION ANALYSIS OF LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (Comm. Print 1959) (Leg. Hist. 966). The analysis of the hot cargo

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[16] At the time H.R. 7265 was introduced, § 303(a) specifically enumerated the unfair labor practices of § 8(b)(4) which were actionable in a civil suit. However, the previous Bills being discussed in the House had proposed amending § 303(a) to delete the specific listing of § 8(b)(4) violations. Since Representative Kearns did not propose amending § 303, it is unclear whether he intended for violations of § 8(b)(4)(iii) to be actionable in a § 303 lawsuit.

prohibition did not discuss a possible civil suit. The analysis of the secondary boycott amendments stated that it "amends § 303(a) . . . so as to permit suits for damages against unions *which violate secondary boycott provisions.*" *Id.* (emphasis supplied). Once again there was no mention of amending § 303 to provide for a civil damage action for violation of the newly added prohibition against voluntary hot cargo agreements.

In sum, the express statutory language and the explicit legislative history show that Congress did not intend to authorize a civil damage suit for violations of the hot cargo provisions of the Act.

(2) The Courts Have Narrowly Construed Their Jurisdiction Under Section 303.

The courts have uniformly held that they do not have jurisdiction in a § 303 lawsuit unless there has been a violation of § 8(b)(4). In *Mishara Construction Co.* v. *IBEW Local 284*, 554 F.2d 488 (1st Cir. 1977), the plaintiff general contractor brought a § 303 damage action against the union for threatening and coercing his sub-contractors to cease work. The crux of the plaintiff's complaint was that an illegal clause in the agreement between the union and the sub-contractors supposedly coerced them into ceasing work. In upholding the district court's dismissal of the § 303 suit, the First Circuit stated:

> Even assuming without deciding, that [the parties] had entered into an agreement, express or implied, and—going further—that the cancellation provision contained in the agreement was an unfair labor practice and not within the construction

> industry proviso to § 8(e), [the plaintiff] could not by reason of those facts alone, recover damages under § 303. *Section 303 is triggered only by violations of § 8(b)(4).*
>
> * * * *
>
> Whatever the status under § 8(e) of this clause with its cancellation provision, we are not persuaded that the mere existence of such a clause without more, amounts to coercive conduct violative of § 8(b)(4).

Id. at 491-492 (emphasis supplied, citations omitted).

In *National Maritime Union* v. *Commerce Tanker Corp.*, 411 F. Supp. 1224 (S.D. N.Y. 1976), *aff'd in pertinent part, rev'd on other grounds,* 553 F.2d 793 (2d Cir. 1977), *cert. denied,* 434 U.S. 923 (1977), the court, after noting that § 303 authorized a suit for damages where there had been a violation of § 8(b)(4), went on to state that "there *mere making* of a contract which violates § 8(e) does not in and of itself give rise to a cause of action *for damages.* It is only where the *added* elements of § 8(b)(4) are found to exist that a cause of action for damages accrues." *Id.* at 1229 (emphasis in original).

This Court discussed the availability of a § 303 suit in *Connell Construction Co.* v. *Plumbers Local 100,* 421 U.S. 616 (1975). In that case a General Contractor (Connell) signed a hot cargo agreement under protest, after the union commenced picketing to obtain the agreement. After signing the agreement, Connell sued the union in an anti-trust action and one of the issues was whether labor-law remedies, including § 303, were

exclusive remedies. The four-member minority expressed their view that § 303 was *not* available to remedy a *voluntary* hot cargo agreement. Justice Stewart, speaking for the minority, stated:

> If Connell and Local 100 had entered into a purely voluntary "hot cargo" agreement in violation of § 8(e), an injured nonunion . . . subcontractor would have no § 303 remedy because the union would not have engaged in any § 8(b)(4) unfair labor practice. *The subcontractor, however, would still be able to seek the full range of Board remedies available for a § 8(e) unfair labor practice.*

Id. at 648 n.9 (emphasis supplied) (Stewart, J., dissenting).

The majority in *Connell* did not discuss or dispute the statement of the minority concerning the non-availability of a § 303 suit to remedy a voluntary hot cargo agreement. The majority simply held that the labor-law remedies for § 8(e) violations were not exclusive and that, under appropriate circumstances, anti-trust remedies were also available.

The *Connell* case is important for two reasons. First, it demonstrated that the Court did not believe that a civil damage action under § 303 was available *unless* there had been a violation of § 8(b)(4). Second, and most important, it demonstrated that the Court believed that the full range of Board remedies were available to remedy hot cargo violations, i.e., there were no restrictions on the Board's authority to grant "make-whole" remedies.

B. It Is Illogical To Assume That Congress Intended For An Injured Party To Have A Cause Of Action For Damages Against Only One Of The Parties To The Illegal Hot Cargo Agreement That Caused His Damages.

The jurisdictional grant of § 303 speaks only in terms of a civil action against a labor union and does not authorize civil suits against employers. Clearly both the employer and the union share in the responsibility for any damages flowing from the enforcement of an illegal hot cargo agreement. Should the union "coerce" the employer into entering into the hot cargo agreement, the employer can seek relief under § 8(b)(4)(A) and/or a damage action under § 303. However, it defies logic to believe that Congress intended that the full financial responsibility for "voluntary" illegal hot cargo agreements should fall only on one of the parties to the agreement. Since both parties "voluntarily" entered into the agreement, they should both be held liable for any damages flowing from its enforcement. Absent a clear showing that Congress intended such an inequitable result, it should not be assumed that courts have jurisdiction for violations of § 8(e) of the Act.

C. Summary Of The Board's Alternate Remedy Theory.

In his Petition for Writ of Certiorari, the petitioner demonstrated that even if a § 303 suit was available, it would nonetheless be impractical for a small, independent businessman to pursue such a remedy (P.A. 11a-13a). That discussion remains appropriate but for the sake of brevity will not be repeated in this Brief.

It is the petitioner's primary contention, however, that a § 303 civil suit is not available for violations of the hot cargo prohibition found in § 8(e) of the Act. The legislative history of § 303 indicates that Congress intended no more than to ensure that victims of secondary boycotts had an appropriate forum to consider their consequential damage claims.

In 1959, when Congress added § 8(e) to prohibit hot cargo agreements, it did not amend § 303 to provide for a civil suit for violation of § 8(e). Since other changes to § 303 were proposed at that time, including attempts to make other unfair labor practices (besides those in § 8(b)(4)) subject to § 303 civil suit, the exclusion of § 8(e) violations could hardly have been an oversight. As amended, the statutory language of § 303 is clear—it provides for a civil suit against a labor union *only* for violations of the secondary boycott provisions of § 8(b)(4).

The courts have narrowly construed their jurisdictional authority under § 303 and require that there be a violation of § 8(b)(4). Petitioner has been unable to locate any case where a court had allowed a civil suit *solely* for a violation of § 8(e).

It is respectfully submitted that the Board's "alternate theory" is untenable. If the petitioner is to be "made whole," the Board must provide that relief.

CONCLUSION

The petitioner has demonstrated that the Board's reasons for denying a "make-whole" remedy are unsound:

—Coercion is *not* an element of a hot cargo violation and should not be a prerequisite to complete relief;

—Reimbursement orders for hot cargo violations are neither punitive nor overbroad, especially in the context of this case; and

—Civil damage suits for hot cargo violations are not available unless there is also a secondary boycott violation.

The denial of a "make-whole" remedy does *not* effectuate the policies of the Act.

The decision of the Court of Appeals should be reversed with directions to remand the case to the Board for an appropriate remedy.

Respectfully submitted,

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APPENDIX

COMPARISON OF SECTIONS 8(b)(4), 8(e) and 303 *BEFORE* AND *AFTER* THE 1959 AMENDMENTS TO THE LABOR-MANAGEMENT RELATIONS ACT

EXTRACTS FROM BILLS INTRODUCED IN THE FIRST SESSION OF THE 86th CONGRESS TO MAKE ADDITIONAL UNFAIR LABOR PRACTICE VIOLATIONS SUBJECT TO CIVIL SUIT UNDER SECTION 303

SECONDARY BOYCOTT PROHIBITIONS OF THE LABOR-MANAGEMENT RELATIONS ACT *BEFORE* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

8(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage *the employees of any employer*

to engage in, a strike or *concerted* refusal in the course of *their* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services,

where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or

any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person;

(B)

forcing or requiring any other employer to recognize or bargaining with a labor organi-

SECONDARY BOYCOTT PROHIBITIONS OF THE LABOR-MANAGEMENT RELATIONS ACT *AFTER* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

§ 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(*i*) to engage in, or to induce or encourage *any individual employed by any person engaged in commerce or in an industry affecting commerce*

to engage in, a strike or [ ] refusal in the course of *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services*; or*

(*ii*) *to threaten, coerce or restrain any persons engaged in commerce or in an industry affecting commerce,*

where *in either case* an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or

to enter into any agreement which is prohibited by section 8(e);

(B) *forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or*

forcing or requiring any other employer to recognize or bargaining with a labor organi-

zation as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9:

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

zation as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9:

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

SECONDARY BOYCOTT PROHIBITIONS OF THE LABOR-MANAGEMENT RELATIONS ACT *BEFORE* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

§ 8(b)(4) (Cont'd)

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

Provided, That nothing contained in subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employers is required to recognize under this Act;

SECONDARY BOYCOTT PROHIBITIONS OF THE LABOR-MANAGEMENT RELATIONS ACT *AFTER* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

§ 8(b)(4) (Cont'd)

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

Provided, That nothing contained in subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employers is required to recognize under this Act:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

HOT CARGO PROHIBITIONS OF THE LABOR-MANAGEMENT RELATIONS ACT *BEFORE* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

§ 8(e) [Not included]

HOT CARGO PROHIBITIONS OF THE LABOR-MANAGEMENT RELATIONS ACT *AFTER* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

§ 8(e) *It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to any agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.*

SECTION 303 OF THE LABOR-MANAGEMENT RELATIONS ACT *BEFORE* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

§ 303(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in *or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—*

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organiza-

SECTION 303 OF THE LABOR-MANAGEMENT RELATIONS ACT *AFTER* THE LANDRUM-GRIFFIN AMENDMENTS (1959)

§ 303(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in *any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.*

§ 303(a) Cont'd)

tion or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work.

Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

§ 303(a) Cont'd)

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

EXCERPTS FROM LEGISLATIVE BILLS INTRODUCED IN THE FIRST SESSION OF THE 86th CONGRESS WHICH ATTEMPTED TO MAKE OTHER UNFAIR LABOR PRACTICE VIOLATIONS SUBJECT TO CIVIL SUIT UNDER SECTION 303

The following pages contains excerpts from various bills introduced in 1959 which attempted to make additional unfair labor practices subject to § 303 civil suits. The source of the excerpts is The NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959) ("Leg. Hist.").

House of Representatives Bill 4474

H.R. 4474, introduced February 16, 1959, would have amended § 303 to provide for civil suits for both unlawful secondary boycotts *and the imposition of excessive or discriminatory union initiation fees* (§ 8(b)(4) and (5)).

• • • •

(b) Sction 303 of the Labor Management Relations Act of 1947 is amended to read as follows:

"SEC. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) *and 8(b)(5)* of the National Labor Relations Act, as amended.

"(b) Whoever shall be injured in a business or property by reason of any act or acts which are made in unfair labor practices under section 8(b)(4) *and 8(b)(5)* of the National Labor Relations Act, as amended, may sue therefor in any district court of the United States subject to the limita-

> tions and provisions of section 301 of this Act without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and cost of the suit."
>
> • • • •

(Leg. Hist. at 257) (emphasis supplied).

House of Representatives Bill 8400

H.R. 8400 (the original Landrum-Griffin proposal), introduced July 27, 1959, sought to alter § 303 to provide for civil suits for both unlawful secondary boycotts *and unlawful organizational and recognitional picketing* (§§ 8(b)(4) and (7)).

> • • • •
>
> (e) Section 303(a) of the Labor Management Relations Act, 1947, is amended to read as follows:
>
> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) *or section 8(b)(7)* of the National Labor Relations Act, as amended."
>
> • • • •

(Leg. Hist. at 685) (emphasis supplied).

House of Representatives Bill 7265

H.R. 7265, introduced May 29, 1959, would have made the entry into a hot cargo agreement an unfair labor practice for *both* employers and labor unions. It was made applicable to labor unions by the addition of § 8(b)(4)(iii) and to employers by the addition of § 8(a)(6). The bill

made no provisions to amend § 303. The significant portion of the § 8(b)(4) amendment stated:

> (b) Section 8(b)(4) of such Act is amended to read as follows:
>
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike, or to—
>
> "(i) engage in, or induce or encourage the employees of any employer to engage in, a concerted refusal in the course of their employment,
>
> "(ii) cause or attempt to cause, by threats, coercion, or restraint, any person engaged in c commerce to refuse, or
>
> "*(iii) enter into any contract, express or implied, with an employer whereby such employer ceases or refuses, or agrees to cease or refuse*—
>
> to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform any services, where an object thereof is . . .
>
> • • • •

(Leg. Hist. at 595) (emphasis supplied).

NOTE: At the time H.R. 7265 was introduced, § 303(a) specifically enumerated the unfair labor practices of § 8(b)(4) which were actionable in a civil suit. However, the previous Bills being discussed in the House had proposed amending § 303(a) to delete the specific listing of § 8(b)(4) violations. Since Representative Kearns did not propose amending § 303, it is unclear whether he intended for violations of § 8(d)(4)(iii) to be actionable in a § 303 lawsuit.

Respondent's Brief

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No. 81-1627

In the Supreme Court of the United States

OCTOBER TERM, 1982

LARRY SHEPARD, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board abused its remedial discretion under Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), when, upon finding that the Union and Employer Associations had entered into an agreement in violation of Section 8(e) of the Act, 29 U.S.C. 158(e), it ordered them to cease and desist from continuing to give effect to the agreement, but, in the absence of a showing of coercion, declined to order them to reimburse independent contractors for benefit contributions and union fees and dues paid in accordance with the agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 669 F.2d 759. The decision and order of the National Labor Relations Board (Pet. App. 15a-44a) are reported at 249 N.L.R.B. 386.

JURISDICTION

The judgment of the court of appeals (A. 116-117) was entered on December 4, 1981. The petition for a writ of certiorari was filed on March 3, 1982, and was granted on May 17, 1982 (A. 118). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Sections 8(b)(4) and (e) of the National Labor Relations Act, as codified at 29 U.S.C. 158(b)(4) and (e), provide in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *;

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refuses or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * *.

* * * * *

2. Sections 10(c) and (*l*) of the National Labor Relations Act, as codified at 29 U.S.C. 160(c) and (*l*), provide in relevant part:

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter * * *.

* * * * *

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)] (4)(A), (B), or (C) * * * or section [8](e) * * * or section [8](b)(7) * * *, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law * * *.

3. Section 303 of the Labor Management Relations Act of 1947, as amended and codified at 29 U.S.C. 187, provides in relevant part:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting

commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section [8(b)(4) of this Act].

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States * * * without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

[1] So in original. Probably should read "of".

STATEMENT

1. It is a common practice in the building and construction industry in San Diego County, California, for contractors to hire owner-operators of dump trucks to transport materials to, from, or on the job site. The owner-operators typically are hired through brokers, who enter into subhaul agreements with the owner-operators and refer them to jobs for contractors in return for a 5% fee. The contractors pay the brokers for the services, and the brokers in turn pay the owner-operators, after deducting their commissions (Pet. App. 3a-4a, 30a-31a; A. 21-22, 62, 93-95).

The 1977-1980 Master Labor Agreement (MLA) between three Contractors Associations in San Diego County[2] and a number of unions representing employees in construction-related work, including respondent Union,[3] contained provisions that required the owner-operators to become employees of the signatory contractors. The MLA also required that the owner-operators

[2] Associated General Contractors of America, San Diego Chapter, Inc.; San Diego Building Contractors Association; Engineering and General Contractors Association.

[3] Building Material and Dump Truck Drivers, Teamsters Local No. 36, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

be subject to all terms and conditions of the MLA, including the provisions requiring union membership and assuring the payment of wages and fringe benefits as provided in the MLA.[4] In addition, the MLA provided that contractors could procure owner-operators through any person or entity—*e.g.*, a broker—that was a signatory to the MLA and making fringe benefit payments, and that such person or entity would be considered a subcontractor for purposes of the MLA (Pet. App. 22a-25a; A. 10-12).

2. a. On January 29, 1979, upon charges filed by respondent California Dump Truck Owners Association (CDTOA) and petitioner Larry Shepard, an owner-operator of a dump truck, the Board's General Counsel issued an unfair labor practice complaint alleging that the owner-operator provisions of the MLA violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), by providing that the Contractors Associations' members would cease or refrain from doing business with self-employed owner-operators of dump trucks who were not members of the Union (Pet. App. 19a-20a). The complaint did not allege, however, that the Union had violated Section 8(b)(4)(ii)(A) of the Act, 29 U.S.C. 158(b)(4)(ii)(A), by threatening or coercing the owner-operators to join the Union (Pet. App. 13a). Five days earlier, on January 24, 1979, the General Counsel had sought an injunction pursuant to Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), prohibiting further enforcement of the challenged provisions of the MLA pending completion of the Board proceedings. The injunction was entered on March 15, 1979. *Johansen* v. *Building Material and Dump Truck Owners, Local 36*, No. CV-79-0086-E (S.D. Cal.).

b. The evidence at the hearing conducted by the Board showed that in 1977, the Terra Trucking Company was

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[4] The minimum rate for the owner-operators' services is set by the California Public Utilities Commission (A. 20).

operating as a broker for between 200 and 250 owner-operators in the area, dealing regularly with between 25 and 30 of them (Pet. App. 27a; A. 53). In 1974, Fred ReCupido, the owner of Terra, had signed a "short form" contract with the Union that bound Terra to the provisions of the MLA, including its provisions regarding benefits and union security (A. 55). The 1974 agreement was self-renewing, and Terra therefore also was bound by the 1977-1980 MLA (Pet. App. 27a-28a; A. 55-56, 59).

Petitioner Shepard entered into a subhaul agreement with Terra on February 3, 1978 (A. 19-22). In the subhaul agreement petitioner authorized Terra to make deductions from his earnings for a number of purposes, including for "payroll benefits as required by the Union Agreement applicable during the life of [the subhaul] agreement" (*id.* at 22). The amounts deducted for payroll benefits in turn were paid to the Union's pension, health and welfare, and other fringe benefit funds (*id.* at 14-17). Terra made similar deductions and payments for other owner-operators (*id.* at 26). Apparently Terra in general billed contractors on union jobs at higher rates to compensate for these fringe benefit payments (*id.* at 79-80).

Subsequently, in August 1978, ReCupido received a letter from the Union stating that seven of Terra's "employees," including petitioner, were not members in good standing of the Union. The letter requested that these seven be removed from Terra's employ and not be rehired until they were properly cleared by the Union (Pet. App. 28a-29a; A. 27, 79).[5] ReCupido told the seven owner-operators that they would have to join the Union if they wished to work through him, giving them a deadline of September 5, 1978.[6] ReCupido did not stop doing business

---

[5] There also had been a number of conversations between ReCupido and Union representatives on the subject before Terra received the letter (A. 58-59, 74-79).

[6] ReCupido also testified that he told the same thing to an unspecified number of other owner-operators who were not mentioned in the letter but who he knew were not members of the Union

with these owner-operators. Although at the time he was "under the impression" that those named in the letter subsequently joined the Union, he later discovered that some of them did not (Pet. App. 28a; A. 56-58). Petitioner, however, did join the Union in September 1978. He paid an initiation fee at that time and paid dues until April 1979 (Pet. App. 29a-30a; A. 88-89).[7] There was no evidence presented to the Board of threats or coercion by the Union directed toward these owner-operators.[8]

The remaining evidence with respect to the impact of the MLA provisions at issue involved another broker, the Kissinger Trucking Company, which had non-exclusive subhaul agreements with between 75 and 100 dump truck owner-operators (Pet. App. 26a; A. 94-95). In November 1977, Kissinger was informed by the Penhaul Company, a signatory to the MLA to which Kissinger had referred owner-operators, that the owner-operators could not perform on Penhaul's construction job because they were non-union and because Kissinger was not a signatory to the MLA. Subsequently, in February 1978, Kissinger was informed that it could not haul material for another contractor for the same reason. Kissinger then signed the MLA (Pet. App. 5a, 27a; A. 96-98). No evidence was presented to indicate that any owner-operators working through Kissinger joined the Union as a result of Kissinger's new status as an MLA signatory, and there was no evidence of threats or coercion by the Union in connection with Kissinger's experience.

(A. 57). The record does not disclose anything further about these other owner-operators.

[7] The payment of the dues presumably terminated following the injunction issued by the district court on March 15, 1979, pursuant to Section 10(*l*) of the Act. See page 5, *supra*.

[8] ReCupido did state that several owner-operators had been "run off" a construction site by the Union business agent on another occasion (A. 76). These owner-operators were not identified, and evidence about the incident was not developed.

3. The Board held that the owner-operators were "independent contractors" rather than "employees" for purposes of the Act (Pet. App. 15a-16a, 21a-22a, 30a-31a),[9] and that the Union and the Contractors Associations therefore had violated Section 8(e) by "entering into and maintaining" the disputed provisions of the MLA requiring owner-operators to become members of the Union as a condition to their hauling materials for signatory contractors (Pet. App. 15a-16a, 44a). Accordingly, the Board ordered the Union and the Contractors Associations to cease and desist from "maintaining, giving effect to, or enforcing" the unlawful provisions of the MLA (*id.* at 17a, 18a). The Board also ordered, in what it termed "affirmative action designed to effectuate the policies of the Act" (*id.* at 18a), that the Union, the Associations, and the employer members of the Associations post appropriate notices at their places of business, and that the Union make available a notice for posting at Terra's place of business (*id.* at 18a-19a).

The Board declined, however, to order the Union and the Contractors Associations to pay all owner-operators of dump trucks who joined the Union as a result of the enforcement of the MLA the amount of their initiation fees, dues and contributions to employee benefit funds, without

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[9] See 29 U.S.C. 152(3). On this issue, the Board followed its decision in *Associated General Contractors of California, Inc.*, 239 N.L.R.B. 686 (1978), where it had held that owner-operators of dump trucks in Southern California (excluding San Diego County) were independent contractors for purposes of the Act (Pet. App. 21a-22a, 31a). In the latter case, after the decision of the Ninth Circuit in *Associated General Contractors* v. *NLRB*, 564 F.2d 271 (1977), the Board had reversed its previous position that the owner-operators of dump trucks were employees (see Pet. App. 21a-22a). See *Contractor Members of the Associated General Contractors of California, Inc.*, 201 N.L.R.B. 311 (1973); *Associated General Contractors of California, Inc.*, 220 N.L.R.B. 540 (1975). The Board's prior position had been sustained by the District of Columbia Circuit in *Joint Council of Teamsters No. 42* v. *NLRB*, 450 F.2d 1322 (1971), but the District of Columbia Circuit sustained the Board's new position in the instant case (Pet. App. 8a-11a).

regard to whether the Union or the Associations had engaged in coercive conduct to cause them to join the Union. The Board explained (Pet. App. 17a n.2; emphasis in original):

> The Board has on one occasion adopted without comment an Administrative Law Judge's recommended Order containing such a remedy. *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.)*, 208 NLRB 184, 201 (1974). In the present case, however, there is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by Respondents.[10] Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators ordered by the Administrative Law judge [*sic*] would not effectuate the remedial policies of the Act. See *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al.* [*Mechanical Handling Systems, Inc.*] v. *N.L.R.B.*, 365 U.S. 651 (1961).

4. On petitions for review, the court of appeals sustained the Board's findings that the owner-operators were independent contractors, not employees, and that the pertinent provisions of the MLA violated Section 8(e) of the Act (Pet. App. 7a-11a). The court also upheld the Board's remedial order, rejecting the contention by petitioner and respondent CDTOA that the cease and desist order was insufficient as a matter of law (*id.* at 11a-14a).

The court observed that "[t]he Board's remedial power is a broad discretionary one, subject to limited judicial

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[10] Neither Terra nor Kissinger, nor any other broker, was a respondent or charging party in the proceedings.

review' " (Pet. App. 12a, quoting *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)). Accordingly, the court held that in order to prevail on a claim that the Board's remedial order did not go far enough, it must be shown that the remedies the Board did prescribe were " 'clearly inadequate in the light of the findings by the Board' " (Pet. App. 12a, quoting *Electrical Workers Local 806* v. *NLRB*, 434 F.2d 473, 478 (D.C. Cir. 1970)). In this case, the court could not say that the cease and desist order was insufficient[11] to deter further wrongdoing, because both the Union and the Contractors Associations would be subject to contempt sanctions for any future violations of the cease and desist order. Accordingly, the court concluded that it would not "disturb the Board's judgment that the order is sufficient to effectuate the policies of the Act" (Pet. App. 14a).

In particular, the court rejected the contention that the Board abused its discretion in declining to order a reimbursement of fringe benefit contributions and union fees and dues paid by the owner-operators. The court held that although agreements violative of Section 8(e) are unlawful per se, the Board properly finds it inappropriate, in the absence of a showing of coercion, to order reimbursement of sums paid pursuant to such agreements. The court reasoned that "union members receive benefits as well as assume burdens" and that, "obviously, reimbursement to union members who were not coerced into joining would result in an unjust windfall to them" (Pet. App. 13a). It was for this reason, the court observed (*ibid.*), that this Court held in *Carpenters Local 60* v. *NLRB*, 365 U.S. 651 (1961), that the Board was not authorized to require a union to refund dues and fees when there was no evidence that any of the employees had been coerced into joining the Union (*id.* at 655).

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[11] The word "sufficient" is erroneously used in the reprinting of the opinion in the appendix to the petition for a writ of certiorari (Pet. App. 14a) in place of the word "insufficient" that appears in the published opinion (669 F.2d at 767).

The court observed in this regard that Section 8(b)(4)(ii)(A) of the Act makes it unlawful for a union to engage in threatening or coercive conduct if the object thereof is to force or require any employer or self-employed person to join a union or enter into an agreement prohibited by Section 8(e), and the court noted that the Board properly has ordered reimbursement where employers or self-employed persons have been subjected to violations of that Section. In this case, however, no violation of Section 8(b)(4)(ii)(A) was alleged by the General Counsel or found by the Board (Pet. App. 13a-14a). The court explained that this Court had held in *Carpenters Local 60* that a reimbursement order "'in those circumstances becomes punitive and beyond the power of the Board'" (*id.* at 13a, quoting 365 U.S. at 655).

SUMMARY OF ARGUMENT

A.

1. This Court has recognized that Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), charges the Board, not the courts, with the task of devising remedies to effectuate the policies of the Act. The Board's selection of a particular remedy, based on its accumulated experience and expertise, is to be given special respect by reviewing courts.

2. In this case, petitioner and respondent California Dump Truck Operators Association contend that an order requiring reimbursement of fringe benefit contributions and union fees and dues is necessary to redress owner-operators for injuries they allegedly sustained and to prevent similar violations by the Union and Contractors Associations in the future. This argument is mistaken for two reasons.

First, Section 10(c) does not establish a general remedial scheme authorizing the Board to award full compensatory damages for all injuries caused by wrongful conduct. The power to order affirmative action under Section 10(c) is incidental to the primary purpose of Congress to stop and prevent unfair labor practices. A reim-

bursement order therefore vindicates public rights; it is not redress for a private wrong. As a result, the decision whether to order particular affirmative action is entrusted to the Board's discretion, and the Board orders such relief only if it first concludes that the relief will effectuate the policies of the Act.

Second, the firmly established principle of judicial deference to the Board's selection of a remedy applies with particular force where, as here, a court is asked to impose a remedy that goes further than that which the Board believed to be necessary and appropriate to effectuate the policies of the Act. Under Section 10(c), the Board must in all cases order the offending party to cease and desist from the unfair labor practice, thereby restraining future violations of the Act. The further power to order affirmative action is intended to enable the Board to remove or avoid the lingering consequences of a past violation, where those consequences are of a kind that might thwart the purposes of the Act. The Board's accumulated experience may show that, for certain types of unfair labor practices, a cease and desist order alone ordinarily will accomplish the Act's objectives and that there will not exist after issuance of the cease and desist order lingering consequences that would thwart the Act's purposes. In addition, evidentiary uncertainties about the circumstances and equities of the parties, the severity of the unfair labor practice, and the extent of the injury sustained also may lead the Board not to order reimbursement or other affirmative action in a particular case.

These and other factors that counsel reluctance by the courts to interfere with an agency's determination of the extent to which enforcement powers should be exercised through the ordering of certain relief are similar to those that bar or restrict a court from interfering with the exercise of an agency's discretion to decline to initiate enforcement proceedings in the first instance. Although the Board's decision not to order certain affirmative action is not wholly unreviewable, the person challenging the Board's order on the ground that it did not go far

enough must show that the order will be so ineffective in enforcing the Act as to be insufficient as a matter of law. Even then, the appropriate course would be for the court of appeals to remand to the Board for further proceedings, not for the court itself to direct certain relief.

B.

Petitioner and respondent CDTOA have failed to show that the Board's order that the Union and Contractors Associations cease and desist from giving effect to the provisions of the Master Labor Agreement found to violate Section 8(e) and post appropriate notices is insufficient as a matter of law and that the Board therefore abused its discretion in declining to order reimbursement.

1. The record fails to disclose any substantial injury to owner-operators generally as a result of the MLA provisions. Although many owner-operators in San Diego County were potentially affected by the MLA, the record contains evidence only about petitioner and six others who received referrals through Terra Trucking Company. More than six months before the Union sent the August 10, 1978 letter requesting that Terra cease doing business with these seven owner-operators, petitioner had entered into a subhaul contract with Terra in which he agreed to have deductions made for payments to union benefit plans on his behalf. At least five of the six other owner-operators mentioned in the letter apparently also had agreed to such deductions before the Union sent the letter to Terra. There is no indication in the record that any of the seven had any objection to these contributions or that the Union or Associations took any action to cause them to agree to any deductions. Moreover, in return for these contributions, the owner-operators received the benefit of being covered by the fringe benefit plans. For these reasons, it is not clear that even the seven owner-operators mentioned in the Union's letter suffered any net loss as a result of their fringe benefit contributions.

The record also is sparse with respect to the payment of Union initiation fees and dues by owner-operators. Only seven of the 200 to 250 owner-operators with whom Terra dealt were mentioned in the Union's August 10 letter. Many, perhaps most, of the remaining owner-operators who received referrals through Terra or other brokers already may have been members or voluntarily joined the Union. Although the record does show that petitioner and perhaps several other owner-operators working through Terra did join the Union and paid an initiation fee and dues for six months, they received in return the benefits of working under a collective bargaining agreement, including fringe benefit plans, negotiated by the Union.

Because the extent of financial loss to owner-operators generally occasioned by the MLA was speculative, the Board reasonably could choose to rely on the force of its cease and desist order and posting requirements to effectuate the policies of the Act, without ordering reimbursement as well.

2. In determining whether to order reimbursement, the Board also reasonably took into account the fact that Congress adopted an alternative remedial scheme to compensate persons injured by a union's secondary activities by authorizing such persons to bring a suit for damages pursuant to Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. 187. The existence of Section 303 suggests a difference of remedial emphasis between the Board and the courts in the area of secondary activity, with the Board primarily responsible for prospective relief—by means of seeking a preliminary injunction pursuant to Section 10(*l*) of the Act and issuing a cease and desist order pursuant to Section 10(c)—while the courts would redress injuries already sustained. The enactment of Section 10(*l*) also indicates that Congress anticipated that ordinarily secondary activities would be enjoined before the affected parties incur serious injuries.

3. It also was reasonable for the Board, in the exercise of its discretion, to decline to order reimbursement in

the absence of coercive conduct by the Union or Contractors Associations. This position finds significant support in *Carpenters Local 60* v. *NLRB*, 365 U.S. 651 (1961), where this Court held that the Board did not even have the power to order reimbursement of union fees and dues paid to unions that had maintained illegal closed shop preferential hiring conditions, in the absence of evidence of coercion of any employee by the unions to join or remain members of the union.

The Board's position attaching significance to the absence of threats or coercion by the Union that would violate Section 8(b)(4) also finds support in the 1959 amendments to the Act, when Section 8(e) was added. At that time, Congress amended Section 10(*l*) to authorize the Board to seek a preliminary injunction where there is reasonable cause to believe that there was a violation of Section 8(e). Congress also amended Section 303 to permit civil suits for injuries sustained as a result of conduct newly covered by Section 8(b)(4), but, significantly, it did *not* amend Section 303 to permit damage actions for violations of Section 8(e) standing alone. Congress' provision for injunctive relief and withholding of a damage remedy when it enacted Section 8(e) indicates that Congress did not believe that it is necessary, in order to effectuate the policies of the Act, that compensation be available as a matter of course whenever a person sustained some financial loss as a result of the implementation of an agreement found to violate Section 8(e).

Indeed, the decisions upon which petitioner and CDTOA principally rely underscore the importance of the element of coercion in the Board's decisions. Here, such coercion is not established by the Union's mere request that Terra abide by the MLA, in the absence of a threat of a strike or other economic pressure that would violate Section 8(b)(4). *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964).

ARGUMENT

THE BOARD REASONABLY EXERCISED ITS REMEDIAL DISCRETION BY ORDERING THE UNION AND THE CONTRACTORS ASSOCIATIONS TO CEASE AND DESIST FROM GIVING EFFECT TO THE AGREEMENT FOUND TO VIOLATE SECTION 8(e) OF THE ACT, BUT DECLINING TO ORDER THE UNION AND ASSOCIATIONS TO REIMBURSE OWNER-OPERATORS FOR THEIR BENEFIT CONTRIBUTIONS AND UNION FEES AND DUES

The issue in this case is not whether the National Labor Relations Board has the *power* to order the type of relief petitioner and respondent California Dump Truck Operators Association seek to have this Court direct. The Board did not disclaim the power to order the reimbursement of fringe benefit contributions or union fees and dues in all cases involving a violation of Section 8(e) of the National Labor Relations Act on the ground that the Act forecloses such an order. That question therefore is not presented here, and we may assume for present purposes that the Board does have such power in appropriate circumstances. This case presents the quite different question of whether the Act compelled the Board to *exercise* that power here, notwithstanding the Board's considered judgment that a reimbursement order was neither necessary nor appropriate to implement the statutory scheme in the context of this case.

A. The Board Has Broad Discretion In Determining What Remedy Is Appropriate And Sufficient To Effectuate The Policies Of The Act

1. *This Court Repeatedly Has Stressed That The Board Has Broad Discretion To Fashion An Appropriate Remedy For An Unfair Labor Practice*

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), empowers the Board, when it finds that a person has committed an unfair labor practice,

to issue an order requiring that person to "cease and desist from such unfair labor practice" and to take such affirmative action "as will effectuate the policies of the [Act]." The authority conferred by this Section necessarily is stated in general terms. As this Court has recognized, "in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

Section 10(c) therefore "charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). That power "is a broad discretionary one, subject to limited judicial review" (*Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)), for in fashioning an appropriate remedy in a particular case, "the Board draws on a fund of knowledge and expertise all its own." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). "[I]ts choice of remedy must therefore be given special respect by reviewing courts." *Ibid.* Compare *Consolo* v. *FMC*, 383 U.S. 607, 620-621 (1966); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 207-209 (1947).

Congress' vesting of this broad discretion in the Board enables it to balance the sometimes conflicting policy interests reflected in the statutory scheme and the circumstances of the case. *NLRB* v. *Food Store Employees Local 347*, 417 U.S. 1, 8-9 (1974); *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 187 (1973); *NLRB* v. *Seven-Up Bottling Co.*, *supra*, 344 U.S. at 346-349. This discretion also enables the Board to accommodate competing equities and prevent windfalls (*Golden State Bottling Co.* v. *NLRB*, *supra*, 414 U.S. at 184-185; *NLRB* v. *J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 264-265 (1969); *Phelps Dodge Corp.*, v. *NLRB*, *supra*, 313 U.S. at

195, 198; *Carpenters Local 60* v. *NLRB*, 365 U.S. 651, 655 (1961)), and to tailor its remedies to "unfair labor practices of varying intensity." *NLRB* v. *Gissel Packing Co.*, *supra*, 395 U.S. at 612 n.32; cf. *Carpenters Local 60* v. *NLRB*, *supra*, 365 U.S. at 655.

For these reasons, "the relation of remedy to policy is peculiarly a matter of administrative competence" (*Phelps Dodge Corp.* v. *NLRB*, *supra*, 313 U.S. at 194), and this Court accordingly has admonished that courts "must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy" (*ibid.*). To this end, the Court repeatedly has stressed that on petitions for review or enforcement, the Board's selection of a particular remedy to fit the circumstances of the case "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943); see also *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 216; *NLRB* v. *Seven-Up Bottling Co.*, *supra*, 344 U.S. at 346-347.

2. *Judicial Deference To The Board's Discretion Is Particularly Required Where The Board Has Declined To Order Certain Affirmative Action On The Ground That It Is Not Necessary Or Appropriate To Effectuate The Policies Of The Act*

In the instant case, petitioner and respondent CDTOA do not stand in the position of the typical litigant who challenges a remedial order of the Board in this Court or a court of appeals. Ordinarily such a litigant is the party against whom the order runs, and he contends that the order goes too far because it is inequitable or beyond the power of the Board to direct. In those circumstances, the aid of the court is sought to restrain the Board's exercise of its power by preventing the Board from taking action that will have impermissibly injurious consequences for the party challenging the order.

This case is different. Petitioner and CDTOA are not the parties against whom the Board's order runs. They therefore do not contend that the Board has ordered relief that itself will cause them legal injury or request this Court to restrain the Board in the exercise of its remedial powers. To the contrary, they argue that the Board's order directing the Union and the Contractors Associations to cease and desist from giving effect to the provisions of the MLA found to violate Section 8(e) and to take affirmative action by posting appropriate notices on their premises did not go far enough. In their view, a reimbursement order is required to redress owner-operators for injuries they allegedly sustained at the hands of private parties, the Union and the Associations, and to prevent similar violations in the future.

Thus, notwithstanding this Court's repeated recognition of the broad discretion vested in the Board under Section 10(c), petitioner and CDTOA argue, in substance, that upon finding a violation of Section 8(e), and even in the absence of a finding of threats and coercion by the Union in violation of Section 8(b)(4)(ii)(A), a refund of benefit contributions and union fees and dues paid by owner-operators in accordance with the MLA must follow as a matter of course, irrespective of any other factors that might bear upon the appropriateness of such relief in this case. They therefore seek to have the courts exercise power to order affirmative action that the Board declined to order in the first instance, and, as a necessary consequence of a ruling in their favor, effectively to compel the Board to grant remedies in the future that it heretofore has withheld in the exercise of its enforcement discretion.

The position of petitioner and CDTOA is seriously flawed for several reasons. First, it rests on a misconception of the nature and purposes of the Board's remedial power. Congress did not establish in Section 10(c) "a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful

conduct." *Automobile Workers* v. *Russell*, 356 U.S. 634, 643 (1958). The power to order affirmative relief under that Section is merely incidental to the primary purpose of Congress to stop and prevent unfair labor practices. *Id.* at 642-643. Thus, as this Court has made clear, a reimbursement order issued by the Board "is not a redress of a private wrong." *Virginia Electric & Power Co.* v. *NLRB*, *supra*, 319 U.S. at 543. Such orders "somewhat resemble compensation for private injury, but it must be constantly remembered that [they] are remedies created by statute * * * which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights." *Ibid.* This view of the statutory scheme is reflected as well in this Court's recognition that the General Counsel of the Board has unreviewable discretion whether to file an unfair labor practice complaint (*Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967)), even though the consequence of the General Counsel's decision not to file a complaint in a particular case may be to deny a remedy to the charging party or other victim of the assertedly illegal conduct.

Consistent with these principles, this Court has held that even the remedy of back pay, the only "affirmative action" to which Section 10(c) expressly refers, "is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *NLRB*, *supra*, 313 U.S. at 198. To make an award, "the Board must first be convinced that the award would 'effectuate the policies' of the Act." *Automobile Workers* v. *Russell*, *supra*, 356 U.S. at 642-643. Thus, petitioner and CDTOA plainly err in contending that a particular form of affirmative action must be ordered as a matter of course upon the finding of an unfair labor practice. Instead, as we have explained above (see pages 17-18, *supra*), the shape of the Board's remedy properly may depend upon an entire range of factors in the case.

Second, the argument advanced by petitioner and CDTOA ignores that the reasons for deferring to the

Board's judgment in "the relation of remedy to policy" [12] apply with particular force where, as here, a party requests a court to impose additional affirmative relief that the Board, in the exercise of its discretion, has withheld. There are a number of significant considerations that may counsel caution by the Board before embarking upon a more far-reaching remedial course in its enforcement of the Act, and a court should not lightly require the Board to dispense with that caution.

It must be recalled that Section 10(c) in all events provides for the Board to order offending parties to cease and desist from the unfair labor practice, thereby restraining *future* violations. In many cases, and depending upon the nature of the unfair labor practice, the Board's experience may show that the cease and desist order alone will be effective in accomplishing the Act's objectives. In addition, the Board's exercise of its discretion to order affirmative action over and beyond a cease and desist order must be guided by the principle that such an order is not to be punitive in nature. Rather, such action is intended to be an aid in the Board's mission to restrain violations—a " 'means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.' " *Carpenters Local 60* v. *NLRB*, 365 U.S. at 655, quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236 (1938); see also *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 11-12 (1940).

Thus, where it does not sufficiently appear to the Board, either in the circumstances of the particular case or by virtue of its accumulated experience in like cases, that there will exist after issuance of a cease and desist order such lingering consequences as may prevent the accomplishment of the purposes of the Act, the Board may, on balance, conclude it is wiser to decline to order further relief. Cf. *Carpenters Local 60* v. *NLRB*, *supra*,

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[12] *Phelps Dodge Corp.* v. *NLRB*, *supra*, 313 U.S. at 194.

365 U.S. at 655. This Court has recognized as much, observing, as we have noted, that before ordering affirmative relief, "the Board must first be convinced that the award would 'effectuate the policies' of the Act." *Automobile Workers* v. *Russell*, *supra*, 356 U.S. at 642-643. Where there is reason to doubt that an order requiring certain affirmative action would contribute to accomplishing that end, the potential for a punitive impact must give the Board pause as well. Moreover, the Board may be unable confidently to ascertain that further relief is needed or the precise contours it should have if ordered because of evidentiary uncertainties concerning the circumstances and equities of the parties, the severity of the unfair labor practice, and the extent to which injury actually has been sustained by those who were potentially affected.

For the foregoing reasons, reviewing courts must be particularly reluctant to compel the Board to go beyond the remedy it found sufficient, in the face of the Board's express concern that the policies of the Act would not be significantly served by doing so. The reasons counseling reluctance by the courts to intrude upon an agency's determination regarding the *extent* to which its enforcement powers should be exercised in a particular case are similar to those which bar or restrict the courts in interfering with the decision of the agency to decline to initiate enforcement proceedings in the first instance. See *Vaca* v. *Sipes*, *supra*, 386 U.S. at 182; *Dunlop* v. *Bachowski*, 421 U.S. 560, 568-575 (1975); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980); cf. *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).[13]

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[13] The principle of prosecutorial discretion is firmly established in criminal cases. See *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.); *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965).

We do not suggest, of course, that the Board's withholding of an order directing a certain form of affirmative action in a particular case is wholly beyond the power of the courts to review. This Court stated in *NLRB* v. *Food Store Employees Local 347*, *supra*, that there may be situations "when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances" (417 U.S. at 10). Such situations must be rare, however, and indeed petitioner and CDTOA have cited no decision of this Court, and we are aware of none, holding that the Board was required to direct additional affirmative action that the Board had concluded was not necessary or appropriate to effectuate the policies of the Act in the circumstances of the particular case. Moreover, in *Food Store Employees*, the Court made clear that where it appears that the Board may have abused its discretion in omitting a particular remedy, "remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course." Remand is necessary, the Court stressed, in order to "respect[] the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy" (*ibid.*). The Court's approach therefore reinforces the conclusion that courts must be especially reluctant to compel the Board to go further in enforcing the Act than the Board believed was warranted. See also *Liquor Salesmen's Union Local 2* v. *NLRB*, 664 F.2d 1200, 1208 (D.C. Cir. 1981).

Furthermore, in *Food Store Employees* itself, the only decision of this Court we have found that even addresses the situation in which it is contended that the Board's order should have gone further, the Court's focus was not on whether the particular relief sought—a reimbursement of litigation and organizing expenses—was compelled by the policies of the Act standing alone (see

417 U.S. at 7 n.8); the Court was concerned instead with the contention that there were "facial inconsistencies" between the decision of the Board under review and a prior Board decision in which such relief had been ordered (417 U.S. at 9). A remand was ordered to permit the Board an opportunity to clarify the apparent inconsistency, "since a plausible reconciliation by the Board of the seeming inconsistency was reasonably possible" (*ibid.*). The remand therefore served to ensure that the Board did not exercise its discretion in an arbitrary or capricious manner by granting relief in one case but denying it in another that was, from the Board's perspective, in all material respects indistinguishable. Cf. *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 572-573.

The type of limited judicial review exercised in *Food Store Employees* is something quite different from a court's substituting its judgment for the Board's determination that a particular form of affirmative action is neither necessary nor appropriate to effectuate the policies of the Act in the particular case, as petitioner and CDTOA urge here (Pet. Br. 14-28; CDTOA Br. 15-30).[14] See, *e.g.*, *Amalgamated Local 355* v. *NLRB*, 481 F.2d 996, 1007 (2d Cir. 1973); *United Steelworkers* v. *NLRB*, 646 F.2d 616, 631 n.33 (D.C. Cir. 1981); cf. *NLRB* v. *Martin A. Gleason, Inc.*, 534 F.2d 466, 482 (2d Cir. 1976). In such a case, as the court of appeals correctly held, the party challenging the Board's action must show that " 'the remedies prescribed by the Board are clearly inadequate in the light of the findings of the Board' " (Pet. App. 12a, quoting *Electrical Workers Local 806* v. *NLRB*, 434 F.2d 473, 478 (D.C. Cir. 1970)), or, put another way, that those remedies " 'will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of

[14] CDTOA also argues (Br. 30-46) that the Board has arbitrarily and capriciously departed from prior precedents in which it has ordered a reimbursement remedy. As we explain below (see pages 29-30 n.17, 42-43, *infra*), this argument is without merit, for the Board has given a reasoned explanation for not ordering reimbursement here.

law.'" *United Steelworkers Local 5571* v. *NLRB*, 401 F.2d 434, 438 (D.C. Cir. 1968), cert. denied, 395 U.S. 946 (1969), quoting *Amalgamated Clothing Workers* v. *NLRB*, 371 F.2d 740, 746 (D.C. Cir. 1966).[15] As we explain below, petitioner and CDTOA have wholly failed to make such a showing here.

B. The Board Did Not Abuse Its Discretion In This Case By Declining To Order A Reimbursement Of Fringe Benefits Contributions And Union Fees And Dues To Owner-Operators Who Joined The Union

Upon finding that the Union and the Contractors Associations violated Section 8(e) of the Act, the Board ordered the Union and Contractors Associations to cease and desist from "maintaining, giving effect to, or enforcing" the provisions of the MLA found to violate Section 8(e) and ordered affirmative action in the form of the posting of appropriate notices on the premises of the Union, the Contractors Associations, the members of the Associations, and (if willing) Terra, the broker through whom petitioner obtained referrals (Pet. App. 18a-19a). The Board declined to order a reimbursement of fringe benefit contributions and union fees and dues paid by owner-operators as required by the MLA, because there

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[15] In contrast, the Ninth Circuit improperly reversed the respective roles of the Board and the reviewing court in holding, in the case parallel to the instant one concerning the MLA in Southern California (exclusive of San Diego County), that a reimbursement order must issue on remand unless the Board can show to the satisfaction of the court of appeals that such an order would *not* effectuate the policies of the Act. See *Joint Council of Teamsters No. 42* v. *NLRB*, 671 F.2d 305, 312-313 (9th Cir. 1981), petition for cert. pending, No. 82-3 (filed July 1, 1982). See also *Acco Construction Equipment, Inc.* v. *NLRB*, 511 F.2d 848, 852 (9th Cir. 1975). In *Textile Workers* v. *NLRB*, 475 F.2d 973 (D.C. Cir. 1973), cited by CDTOA (Br. 16, 17, 48), the court simply remanded because the Board did not give an adequate explanation for denying a particular remedy. See also *Electrical Workers* v. *NLRB*, 426 F.2d 1243 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970).

was insufficient evidence in the record with respect to alleged losses directly attributable to coercion by the Union and Associations and because the Board finds a reimbursement order typically to be overbroad and inappropriate in the context of Section 8(e) violations. The Board noted as well that independent contractors, such as petitioner and the members of CDTOA, who are injured by the secondary activities of a union may pursue a damage claim in court pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C. 187 (Pet. App. 17a n.2). The Board's decision in these circumstances that its cease and desist order and requirement for the posting of notices were sufficient to effectuate the policies of the Act and that it was not necessary or appropriate to go further was well within the Board's discretion.

1. ***The Record Does Not Establish That Owner-Operators Suffered Substantial Injury As A Result Of The Provisions Of The Master Labor Agreement Found To Violate Section 8(e)***

a. As an initial matter, it is important to keep in perspective the limited nature and extent of the consequences that actually were shown to have resulted from the provisions of the MLA at issue here. Although a number of owner-operators apparently made contributions to various health, welfare, and other benefit plans established by the MLA, those owner-operators presumably received in return the protection afforded by being covered by such plans. In addition, the Terra Trucking Company apparently in general charged a higher rate on union jobs to compensate for the added cost of the fringe benefit payments (A. 79-80). It therefore is by no means clear to what extent petitioner and other owner-operators incurred a net loss by virtue of their fringe benefits contributions.

Moreover, petitioner agreed in his subhaul contract with Terra that deductions would be made from his income for "payroll benefits as required by the Union

Agreement applicable during the life of [the subhaul] agreement" (A. 22). Petitioner entered into the subhaul contract on February 3, 1978 (*id.* at 19), well *before* the Union sent Terra the August 10, 1978 letter advising it that petitioner and six other dump truck operators were not members of the Union (*id.* at 27)—the letter that led to petitioner's joining the Union. There is no indication that petitioner either harbored or voiced any objection to signing the subhaul agreement in February 1978 and consenting thereby to the deductions for contributions to the Union benefit plans. Nor is there any indication that the Union or the Associations engaged in any affirmative conduct to cause him to sign the subhaul agreement.

Terra also made contributions to the Union plans on behalf of at least five of the remaining six owner-operators mentioned in the Union's August 10 letter well before that letter was received (A. 26-27). These payments presumably also were made pursuant to the provisions of subhaul agreements such as that entered into by petitioner (see *id.* at 53, 55). And again, the record does not suggest that these owner-operators—the only other ones about whom there is evidence in the record—objected to these deductions. Thus, it was not shown in this case that the contributions by petitioner and other owner-operators to the benefit plans resulted from any actions whatever by the Union or Contractors Association to seek compliance with or to "enforce" the MLA, much less from threats or coercion by either to accomplish that end.

b. The record also is sparse with respect to the payment of Union initiation fees and dues by owner-operators. The record contains evidence about only two brokers, Terra and the Kissinger Trucking Company. There was no showing that any owner-operator joined the Union as a result of the decision by Kissinger to sign the MLA in February 1978. In addition, the record indicates that although Terra alone operated as a broker for between 200 and 250 owner-operators and dealt regularly with 25 or 30 of these (Pet. App. 27a; A. 53), the letter

sent by the Union to Terra on August 10 identified only seven of the owner-operators with whom Terra dealt as not being members in good standing of the Union. The reasonable inference is that most if not all of the others already were members of the Union.[16] These other owner-operators might have been members of the Union even before they began to receive referrals through Terra or subsequently joined the Union voluntarily in order to receive the benefits of representation or because they supported the Union's goals. Compare *Carpenters Local 60* v. *NLRB*, *supra*, 365 U.S. at 654-655.

Moreover, of the seven persons mentioned in the Union's August 10 letter to Terra, it appears that not all even subsequently joined the Union (Pet. App. 28a; A. 56-58), and, with one exception, the record does not disclose which ones did, the circumstances of their decision, or the extent of their payments. Thus, of all the independent owner-operators of dump trucks in San Diego County who were potentially affected by the MLA, the direct evidence regarding the payment of initiation fees and dues to the Union reduces to that pertaining to only one owner-operator: petitioner Shepard. After Terra received the August 10 letter from the Union, and ReCupido discussed the letter with the non-Union owner-operators, petitioner joined the Union and paid an initiation fee in September 1978 and apparently paid union dues periodically thereafter until April 1979 (*id.* at 89), shortly after the Section 10(*l*) injunction was issued.

Although petitioner therefore did contribute to the Union to this extent, it is necessary to recall, as the court of appeals observed, that "union members receive benefits as well as assume burdens" (Pet. App. 13a). In this case, petitioner worked under a collective bargaining agreement negotiated by the Union that established fringe benefit plans for all within its scope, including petitioner. And indeed petitioner agreed that Terra would make de-

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[16] See note 6, *supra*.

ductions from his income for contributions to those plans and thereby presumably benefited by whatever protection they afforded beginning in February 1978, more than seven months *before* he paid his initiation fee and began paying dues to support the Union that negotiated the collective bargaining agreement establishing the plans.

c. In sum, the extent of the financial loss to owner-operators generally that was occasioned by the provisions of the MLA found to violate Section 8(e) is speculative. The evidence actually shows only that a handful of owner-operators joined the Union because of the existence of the MLA or actions of the Union (compare *Amalgamated Local 355* v. *NLRB*, 481 F.2d 996, 1007 (2d Cir. 1973)), and it indicates that petitioner and perhaps the other six owner-operators about whom there is evidence in the record consented to have deductions made for Union benefit plans. Because even these owner-operators may have received benefits as well as assumed burdens as a result of the MLA provisions at issue here, this case may be viewed as presenting an instance of "ambiguous injury" that does not warrant imposition of a reimbursement order, even if the Board were to focus on financial loss alone. See *Seafarers International Local 777* v. *NLRB*, 603 F.2d 862, 890 (D.C. Cir. 1978). The Board therefore reasonably could conclude that it was appropriate in this case only to order the Union and the Associations to cease and desist from giving effect to the MLA provisions in the future and to post appropriate notices, because a reimbursement order would be "overbroad" (Pet. App. 17a n.2) to the extent that it would result in a windfall for certain owner-operators and perhaps have a punitive impact on the Union.[17]

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[17] Petitioner (Br. 20, 24) and respondent CDTOA (Br. 23-29, 35-38) point out that the Board, with court approval, has ordered reimbursement of union dues and fees exacted from *employees* under an agreement with a company-dominated union or an agreement containing unlawful union-security provisions. See, *e.g.*, *Virginia Electric & Power Co.* v. *NLRB*, *supra*; *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1357-1358 (9th Cir. 1970). However, in

In addition, the question of what " 'consequences of violation' " [18] are of a kind that might impede the accomplishment of the Act's purposes is a matter committed to the expert judgment of the Board, based on its accumulated experience. It follows that whether affirmative action should be required to dissipate lingering effects of a violation to make the Board's cease and desist order effective in preventing unfair labor practices in the future, therefore likewise must be committed to the broad discretion of the Board.

In this case, in view of the absence of proof that the provisions of the MLA at issue had a substantial adverse impact on owner-operators generally, the Board reasonably could conclude that it was not sufficiently shown that there would be the type or degree of consequences of an unfair labor practice that might render the Board's cease and desist order and posting of notices insufficient to effectuate the policies of the Act. In these circumstances, the Board properly could decline to issue a reimbursement order, and choose instead to rely on the binding effect of a cease and desist order to prevent unfair labor practices in the future, enforced if necessary through contempt proceedings. See Pet. App. 14a; *Amalgamated Local 355* v. *NLRB*, *supra*, 481 F.2d at 1007. At the very least, it cannot be said that the cease and desist

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those situations, the Board could well conclude that reimbursement of such dues and fees would be necessary to remove a lingering taint that the unfair labor practices otherwise might impose on the employees' right freely to select a representative of their own choosing in the future. See *Virginia Electric & Power Co.* v. *NLRB*, *supra*, 319 U.S. at 541. Here, by contrast, there is not the same danger of a lingering taint. The owner-operators, being independent contractors, are not guaranteed organizational rights by Section 7 of the Act, 29 U.S.C. 157. Although they are entitled to conduct their business operations free of the restraint of unlawful Section 8(e) agreements, the Board reasonably could conclude that an order prohibiting the utilization of such agreements in the future would adequately safeguard their interests.

[18] See *Carpenters Local 60* v. *NLRB*, *supra*, 365 U.S. at 655, quoting *Consolidated Edison Co.* v. *NLRB*, *supra*, 305 U.S. at 236.

order and posting of notices "will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law." *United Steelworkers Local 5571* v. *NLRB*, *supra*, 401 F.2d at 438.

CDTOA contends (Br. 11-12, 20-23), however, that the Board should have ordered reimbursement of benefit contributions and initiation fees because such an order would furnish a disincentive for the Union and Associations to enter into a similar agreement in violation of Section 8(e) in the future, especially in view of the Union's efforts in the past to have the owner-operators join the Union. It may well be that, in a situation involving repeated violations of Section 8(e), the Board could conclude that imposition of a reimbursement order would be appropriate as a means of effectuating the purposes of the Act, because it might curtail what experience would have shown to be an incentive for the Union and Associations to continue to enter into successive agreements that violate Section 8(e). That is something quite different, however, from saying that reimbursement is required in every case of a Section 8(e) violation, as CDTOA apparently urges—a result that would strip the Board of its traditional discretion to determine how best to fashion a remedy for a violation by a party who has committed similar violations in the past. See, *e.g.*, *United Steelworkers* v. *NLRB*, 646 F.2d 616, 631 n.33 (D.C. Cir. 1981); *Amalgamated Local 355* v. *NLRB*, *supra*, 481 F.2d at 1007.

Here, it plainly was not an abuse of discretion for the Board to decline to order such relief. The Union's efforts to have owner-operators join the Union occurred largely during a period when the Board, upheld by the District of Columbia Circuit, had concluded that the owner-operators were employees, not independent contractors, for purposes of the Act and therefore were an appropriate subject of the Union's organizing efforts. The District of Columbia Circuit did not finally reverse its position and reject the Union's argument on that issue until its decision in this very case (Pet. App. 8a-11a). If the Union and Associa-

tions persist in seeking to require owner-operators to join the Union by adopting contract provisions in violation of Section 8(e), now that this threshold issue has been finally resolved against the Union, the Board will have ample opportunity to consider whether affirmative action beyond a cease and desist order and a requirement for the posting of notices is appropriate.

2. *The Board Properly Could Take Into Account The Provision For A Damages Remedy Under Section 303 Of The Act*

The Board, in declining to order reimbursement, also observed (Pet. App. 17a n.2) that persons who claim to have been injured by the secondary activities of a union may bring a suit for damages pursuant to Section 303 of the Labor Management Relations Act. Section 303 provides that any person who has been injured in his business or property by reason of conduct by a union in violation of Section 8(b)(4) of the Act may sue in United States District Court or in state court "and shall recover the damages by him sustained and the cost of the suit". 29 U.S.C. 187(b). See, *e.g.*, *Summit Valley Industries, Inc.* v. *Carpenters Local 112*, No. 81-497 (June 1, 1982). The existence of this alternative means to recover compensation as of right for injuries caused by secondary activities may counsel some hesitation on the Board's part in undertaking to order the payment of compensation to accomplish the same end. As we have noted, in Section 10(c), unlike in Section 303, Congress did not "establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct". *Automobile Workers* v. *Russell*, *supra*, 356 U.S. at 643.[19]

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[19] This is not to say, of course, that petitioner or members of CDTOA necessarily would recover in a suit brought pursuant to Section 303. As we explain below (see pages 38-42, *infra*), a plaintiff may recover under Section 303 only for injuries sustained as a result of threatening or coercive union conduct that would independently violate Section 8(b)(4); damages cannot be recovered

Section 303 was enacted by the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 158, by which Congress also amended the Act to include for the first time prohibitions against secondary boycott activities by unions.[20] The Labor Management Relations Act of 1947 also added Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), which directs the General Counsel to seek a preliminary injunction against secondary activity if he has reasonable cause to believe that a charge of a violation of Section 8(b)(4) of the Act is true. Section 10(*l*) was amended in 1959 to provide for a preliminary injunction to prevent other secondary boycott activities by unions made unlawful by Section 8(b)(4) in 1959, as well as to enjoin the maintaining or enforcement of an agreement between a union and employer if there is reasonable cause to believe that it violates Section 8(e) of the Act. Thus, the Act was structured in 1947 so that secondary boycott activity—including, now, the maintaining and enforcement of an agreement in violation of Section 8(e)—ordinarily will be enjoined before the affected parties have incurred serious damage.[21] Indeed,

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for financial losses resulting merely from implementation of an agreement found to violate Section 8(e). The essential point for present purposes, however, is not whether any particular plaintiff might recover in a Section 303 suit, but rather that Congress has provided in Section 303 an alternative remedial scheme focusing on private damages in cases involving secondary activity *generally*.

[20] As originally enacted in 1935, the Act established protections for employees engaged in union and other concerted activities and prohibited certain conduct by employers that interfered with employees' rights, but did not declare any union conduct to be an unfair labor practice.

[21] Data generated by the Board indicate that in fiscal 1978, the latest year for which statistics were compiled, the median time from the filing of a charge with the Board to the filing of a petition for a Section 10(*l*) injunction in district court was 15.7 days, and the median time from the filing of the petition to the district court's ruling was 15.4 days. The total median time from filing the charge to the grant of the injunction was thus 31.1 days.

a Section 10(*l*) injunction was entered in this very case (see page 5, *supra*), and petitioner ceased paying union dues after it was entered (A. 79).[22]

Section 303 is the other aspect of the remedial scheme enacted by Congress to address the specific problem of secondary activity by Unions. In explaining the need for the addition of Section 303 to the pending bill in 1947, Senator Taft noted that, without such a provision, "there is a kind of injunctive remedy through the National Labor Relations Board, but there is no possibility of a suit for damages." 93 Cong. Rec. 5060. The amendment was necessary "to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost." *Ibid.* Senator Taft added that, while consideration had been given to lodging the power to award monetary damages in such situations with the Board, "it is not felt * * * that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that

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[22] Petitioner complains (Br. 10) that eight months elapsed between the time he filed his unfair labor practice charge and the date on which the Section 10(*l*) injunction was entered. Actually the time was less: petitioner filed his first charge on August 25, 1978 (Br. 9) and an amended charge on October 20, 1978 (A. 28); the injunction was requested on January 24, 1979, and granted on March 15, 1979—less than seven months after petitioner filed his first charge. CDTOA, however, had filed an unfair labor practice charge on December 19, 1977. As explained above (see note 21, *supra*), the experience in this case was not typical, for the median time in 1978 between the filing of a charge and the grant of an injunction was 31 days. The delay in this case apparently was attributable to the litigation in court and before the Board on the question whether owner-operators were independent contractors rather than employees; if they were employees, there would have been no violation of Section 8(e) and therefore no basis for seeking a Section 10(*l*) injunction. This issue was not finally resolved by the Board until December 7, 1978, when the Board reversed its previous position and held that owner-operators in Southern California (excluding San Diego County) were independent contractors. See note 9, *supra*. The General Counsel then sought a Section 10(*l*) injunction in this case a month and a half later.

that particular function should be in the Board. So, if such a remedy is to be provided at all, if there is to be any recourse for financial losses caused by unions, it must be by direct suit, as proposed by the amendment." *Ibid.*

Shortly after enactment of the 1947 amendments, the Board, in *In re National Maritime Union*, 78 N.L.R.B. 971 (1948), enforced, 175 F.2d 689 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950), declined to assess money damages against a union for losses suffered by employers as a result of a strike violative of Section 8(b)(2) of the Act, 29 U.S.C. 158(b)(2). The Board, relying on the legislative history of Section 303, explained (78 N.L.R.B. at 989; footnote omitted):

> [T]o [award damages] would involve our assuming a power which is appropriately a function of the courts, rather than of administrative tribunals. We would take such a step only if we believed that it was clearly the intention of the Congress that we do so. We find no such mandate in the amended Act; to the contrary we find, in the structure of the Act, and in its legislative history, a clear prohibition against our granting the [requested] remedy.

The text and legislative history of Sections 10(*l*) and 303 of the Act therefore reinforce the conclusion that the Board is not required as a matter of course to award compensation to persons injured as a result of secondary activity by a union, irrespective of the entire matrix of considerations that may bear upon the Board's determination whether particular affirmative action would be necessary or appropriate to effectuate the policies of the Act in the particular case. Rather, Sections 10 and 303 suggest a certain division of responsibility in the area of secondary activity, with the Board being responsible for prospective relief—by means of seeking a preliminary injunction pursuant to Section 10(*l*) and ordering permanent relief

pursuant to Section 10(c) in the form of a cease and desist order at the conclusion of the unfair labor practice proceedings—while the courts would entertain suits under Section 303 brought by those seeking compensation for injuries sustained.[23]

For these reasons, the existence of Section 303 properly may inform the Board's judgment whether the exercise of its discretion under Section 10(c) to order a particular form of affirmative action is required to accomplish the objectives of the Act in the circumstances of the case. In other words, in determining what action is necessary to effectuate the congressional purpose, it is appropriate for the Board to consider not only the *substantive* policies embodied in the Act, but also the policies reflected in the remedial scheme

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[23] The mere provision in Section 303 for the recovery of monetary damages in some cases does not, of course, bar the Board from ordering affirmative action in the form of monetary payments under Section 10(c). To the contrary, in *In re National Maritime Union*, *supra*, rendered soon after Section 303 was enacted, the Board acknowledged that it had the power to order "the payment of monies" where such relief is of the make-whole kind authorized by Section 10(c). 78 N.L.R.B. at 989. Section 10(c) was amended in 1947 to make clear that backpay liability could be imposed on labor organizations, as well as employers, where they were "responsible for [employment] discrimination suffered by the employees." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 54 (1947).

Nor does the fact that damages may be recovered under Section 303 for the specific conduct in issue—secondary activities—bar the Board from ordering reimbursement in similar circumstances. Section 10(a) itself provides that the Board's authority to prevent unfair labor practices is not affected "by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. 160(a); see *NLRB* v. *Strong*, 393 U.S. 357, 360 (1969). As we have explained, however, the question here is not whether the Board was *prohibited* from ordering reimbursement in this case, but whether it was *required* to do so. The existence of Section 303 and the exclusion therefrom of cases involving a violation of Section 8(e) standing alone (see pages 38-42, *infra*), strongly support the conclusion that the Board was not *required* to order reimbursement here.

by which Congress has sought to accomplish its substantive ends.[24]

3. *It Is Reasonable For The Board To Decline To Order Reimbursement In The Absence Of Coercion*

a. It also was entirely reasonable for the Board to decline to order the reimbursement of fringe benefit contributions and fees and dues on the ground that there was insufficient evidence in the record of losses attributable to coercion by the Union and Associations. This Court has recognized that the Board properly may tailor its remedies to "unfair labor practices of varying intensity." *NLRB* v. *Gissel Packing Co., supra*, 395 U.S. at 612 n.32; see, *e.g.*, *Carpenters Local 60* v. *NLRB, supra*, 365 U.S. at 654. Indeed, that the Board at the very least did not abuse its discretion in deeming the absence of threats or coercion by the Union and Associations a relevant factor follows from this Court's decision in *Carpenters Local 60* v. *NLRB, supra.*

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[24] Petitioner contends (Br. 31) that the courts are the preferred forums under Section 303 only with respect to awarding "consequential damages," apparently in the form of lost profits, etc., but not for reimbursement of monies paid in the form of benefit contributions and union dues and fees. Nothing on the face of Section 303 suggests that the Board must make such a distinction, for in either case the monetary loss would appear to constitute injury to "business or property" within the meaning of Section 303(b). Moreover, even assuming that Section 303 was enacted because of a perception that a court is a more suitable forum for assessing consequential damages, as petitioner argues, it does not follow that the division of responsibility Congress contemplated must be so limited, since Section 303 in terms is not. We note as well that in many cases in which a self-employed person actually has been coerced into joining a union, he might have both a claim for damages for the period when he initially resisted union pressure and thereby lost work, and a claim to recover monies paid after acceding to that pressure. It is reasonable that both monetary claims be presented in a single forum.

In *Carpenters Local 60*, the Board held that the unions had violated Sections 8(b)(1)(A) and (2) of the Act by maintaining and enforcing an agreement that established closed shop preferential hiring conditions and by causing the company to refuse to hire two applicants because they had not been referred by the local. The Board ordered a reimbursement of dues, fees, and assessments collected under the illegal contract. This Court reversed the reimbursement order on the ground that there was no evidence of coercion of any employee by the unions to join the union ranks or remain as members. 365 U.S. at 654. Where the membership in the union was not shown to have been influenced or compelled by the union's unfair labor practice, the Court held, no "consequences of violation" are removed by the order compelling the union to return all dues and fees collected from the members, and a reimbursement order becomes punitive and beyond even the *power* of the Board to issue. *Id.* at 655; see also *Teamsters Local 357* v. *NLRB*, 365 U.S. 667, 669-672 (1961). Although there are distinctions between *Carpenters Local 60* and the instant case in the nature of the unfair labor practice involved, surely that case fully supports the conclusion that the Board did not abuse its broad discretion in likewise relying on the absence of threats or coercion as a relevant factor here.

b. The reasonableness of the Board's regarding the absence of union coercion of the kind that would violate Section 8(b)(4) of the Act as a relevant factor in fashioning an appropriate remedy is further underscored by Congress' amendments to the secondary boycott provisions of the Act in the Landrum-Griffin Act of 1959. Those amendments, including Section 8(e), were enacted to close certain loopholes that had been identified in the operation of the prior Section 8(b)(4)(A), 29 U.S.C. (1958 ed.) 158(b)(4)(A). See *NLRB* v. *Servette, Inc.*, *supra*, 377 U.S. at 51-54; *Woelke & Romero Framing, Inc.* v. *NLRB*,

No. 80-1798 (May 24, 1982), slip op. 9; *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982), slip op. 11-12; *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 628 (1975); *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 634-635 (1967).

In *Carpenters Local 1976* v. *NLRB*, 357 U.S. 93 (1958) *(Sand Door)*, the Court held that it was not a defense to an unfair labor practice charge under the old Section 8(b)(4)(A) (now Section 8(b)(4)(B)) that the struck employer had agreed in a contract with the union not to handle non-union material—*i.e.*, that a union could not engage in a strike or other concerted activity to enforce a "hot cargo" agreement requiring the employer to boycott goods or services of another party with whom the union had a dispute. However, the Court emphasized that mere execution of the contract or its voluntary observance by an employer was lawful. 357 U.S. at 108. The *Sand Door* decision was believed by Congress "to create a situation in which * * * [hot cargo] clauses might be employed to exert subtle pressures upon employers to engage in 'voluntary' boycotts." *National Woodwork Manufacturers Association* v. *NLRB*, *supra*, 386 U.S. at 634. The theory of Section 8(e) is that "[t]he only way of dealing with such pressures is to nip them in the bud by prohibiting the agreements." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 272 (1959). Section 8(e) accomplishes this by making it an unlawful labor practice for a union and employer even to enter into an agreement whereby the employer refrains from dealing in the products of another employer or ceases doing business with any other person, and declaring all such agreements "unenforcible and void." [25]

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[25] The provision that such agreements are unenforceable and void also removes another concern created by the *Sand Door* decision: that a breach of a "hot cargo" agreement by the employer could give rise to a suit for damages by the union. Section 8(e)

When it amended the Act in 1959, Congress also provided in Section 8(b)(4)(A) that it is an unfair labor practice to engage in concerted or coercive activities for the purpose of causing an employer to enter into an agreement prohibited by Section 8(e). In addition, Congress expanded the coverage of Section 10(*l*) to provide for mandatory injunctions in cases of violations of Section 8(e) and the amended Section 8(b)(4). Finally, Congress also amended Section 303 to permit a damage action to be brought for injuries sustained as the result of any conduct barred by Section 8(b)(4)—as expanded to cover activities designed to force an employer to sign an agreement barred by Section 8(e). But significantly, as petitioner concedes (Br. 28-39), Congress did *not* amend Section 303 to permit a person injured in his business or property merely as a result of a violation of Section 8(e) to sue for damages, and such suits are therefore not authorized under the Act, even though the agreement unlawful under Section 8(e) may have been "enforced" in the sense that the signatory employer ceased doing business with another person in accordance with its terms, thereby causing that person to suffer some financial loss. See *Connell Construction Co.* v. *Plumbers Local 100*, *supra*, 421 U.S. at 634-635 n.16; *id.* at 649-650 n.9 (Stewart, J., dissenting).[26] Only where the union *coerces* the employer into enforcing the agreement would a cause of action for damages lie under Section 303(b), for such

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likewise bars a suit for specific performance of such an agreement, permitting its illegality to be raised as a defense. *Kaiser Steel Corp.* v. *Mullins*, *supra*, slip op. 11-12.

[26] See also *Mishara Construction Co.* v. *Electrical Workers Local 284*, 554 F.2d 488, 491 (1st Cir. 1977); *National Maritime Union* v. *Commerce Tankers Corp.*, 411 F. Supp. 1224, 1229, 1238-1239 (S.D.N.Y. 1976), modified on other grounds, 553 F.2d 793, 803 (2d Cir.), cert. denied, 434 U.S. 923 (1977); *Texas Millinery Co.* v. *United Hatters Union*, 229 F. Supp. 341, 346-347 (N.D. Tex. 1964), aff'd, 362 F.2d 322 (5th Cir. 1966); *Atchison, T.&S.F. Ry.* v. *Teamsters Locals 70, 85 & 315*, 511 F.2d 1193, 1195 (9th Cir. 1975).

coercion would violate Section 8(b)(4) (see *Woelke & Romero Framing, Inc.* v. *NLRB*, *supra*, slip op. 20) and therefore Section 303(a).

Congress' failure to provide a damage remedy against a union under Section 303 for Section 8(e) violations standing alone therefore reinforces the reasonableness of the Board's decision in this case not to order monetary payments for a violation of Section 8(e) standing alone, unaccompanied by coercive activity of the kind that would violate Section 8(b)(4).[27] Congress evidently believed that the secondary activities addressed by Sections 8(b)(4) and 8(e) were "unfair labor practices of varying intensity" (*NLRB* v. *Gissel Packing Co.*, *supra*, 395 U.S. at 612 n.32) and concluded that, in order to effectuate the policies of the Act, it was not essential that a monetary remedy be made available as a matter of course for all injuries that might be traced to implementation of an agreement found to violate Section 8(e). Congress concluded, in other words, that declaring such agreement "unenforcible and void" in judicial proceedings (*Kaiser Steel Corp.* v. *Mullins*, *supra*) and authorizing the Board to seek an injunction under Section 10(*l*) and order the union and employer to cease and desist from giving effect to the agreement in the future under Section 10(c) ordinarily would be sufficient to accomplish the objectives of the Act. The Board's action declining to award monetary relief on the facts of this case therefore finds powerful support in the statutory scheme.

Although the Board's position means that a third party, like petitioner, who makes payments under an agreement unlawful under Section 8(e) in order to obtain a contract might not be reimbursed for those payments unless it can show that they were coerced by union conduct violative of Section 8(b)(4), that party is in no worse position than one who refuses to make the payments and thereby loses

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[27] Compare *Teamsters Local 814* (*Santini Brothers, Inc.*), 208 N.L.R.B. 184 (1974), enforced, 546 F.2d 989 (D.C. Cir. 1976), cert. denied, 434 U.S. 818 (1977), discussed at page 42, *infra*, which did involve coercive activity.

a contract. If Congress could conclude, as it plainly did, that the latter cannot recover damages for the lost contract in a suit under Section 303 because there was no coercion in violation of Section 8(b)(4), certainly it was open to the Board, in the exercise of its broad remedial authority under Section 10(c), to decide not to award restitution in similar circumstances. Moreover, the Board did enter a cease and desist order that precludes the Union and the Contractors Associations from continuing to enforce the unlawful portion of their agreement, and, as the court of appeals properly noted, they "will be subject to contempt proceedings for any future violations" (Pet. App. 14a).

c. The decisions upon which petitioner and CDTOA principally rely (Pet. Br. 24-26; CDTOA Br. 39-46) in fact underscore the importance of the element of coercion in the Board's decisions. In *Teamsters Local 814 (Santini Brothers, Inc.)*, 208 N.L.R.B. 184, 201 (1974), enforced, 546 F.2d 989 (D.C. Cir. 1976), cert. denied, 434 U.S. 818 (1977), the Board adopted the Administrative Law Judge's recommendation that independent contractor owner-operators be made whole for dues and initiation fee payments exacted by a union by conduct in violation of Section 8(b)(4)(A) and (B) to enforce an agreement violative of Section 8(e). Similarly, in *Sheet Metal Workers Local 233*, 196 N.L.R.B. 55, 57 (1972), remanded, 498 F.2d 687 (D.C. Cir.), modified, 214 N.L.R.B. 786 (1974), the Board ordered reimbursement to the employer of payments and penalties exacted by the union in violation of Section 8(b)(4)(B). See also *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1357 (9th Cir. 1970) ("[r]eimbursement is not ordered unless coercion is established either directly or by inference.").[28] Surely, the Board, "in performing its appointed function of bal-

[28] See also *International Union of Operating Engineers Local 12 (Griffith Co.)*, 243 N.L.R.B. 1121, 1125 n.19 (1979), enforced *sub nom. Griffith Co.* v. *NLRB*, 660 F.2d 406 (9th Cir. 1981), cert. denied, No. 81-1485 (June 7, 1982); *General Longshore Workers*

ancing conflicting interests," could "reasonably decide" that the absence in this case of comparable proof of coercion to enforce an agreement violative of Section 8(e) or to compel a self-employed person to join the Union sufficiently distinguished it from prior decisions. Cf. *NLRB* v. *Food Store Employees Local 347*, *supra*, 417 U.S. at 9.

Petitioner contends (Br. 21 n.13) that coercion is established because of the August 10 letter sent by the Union to Terra. However, a mere request by the Union that Terra enforce the agreement, unaccompanied by a threat of a strike or other economic pressure, does not constitute a threat or coercion that Congress has proscribed by Section 8(b)(4) of the Act. *NLRB* v. *Servette*, 377 U.S. 46 (1964); *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 259 (1964).[29]

There is, moreover, no indication of any actions by the Contractors Associations—the other respondents before the Board—or any of their members in connection with the August 10 letter. Terra did require petitioner to join the Union as a condition to his receipt of referrals through it in the future. However, although the Act proscribes union coercion of employers or other business entities, it does not prohibit one employer from coercing another employer or self-employed person. Cf. *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 N.L.R.B. 128, 129 (1968).[30] To order reimbursement of losses re-

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Local 1418, 235 N.L.R.B. 161, 170 n.23 (1978), petition for certiorari filed on June 28, 1982 with respect to the ancillary Section 10(*l*) proceeding, No. 81-2384.

[29] The absence of evidence of threats or coercion by the Union explains why the Regional Director informed petitioner that his charge of a violation of Section 8(b)(4) would be dismissed if it were not withdrawn by petitioner. See Pet. 6.

[30] In *Malbaff*, the Board held that it was not a violation of the Act for one employer to refuse to deal with another employer be-

sulting solely from coercion of an independent business operator by an employer would redress a wrong that the Act does not reach.[31]

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cause its employees were not unionized. The Board explained (172 NLRB at 129):

> Section 8(a)(3) outlaws employer discrimination against employees. But an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees. While, in such situations and in this very case, there may be employer discrimination against employer, we find no justification in the Act itself or in its legislative history for concluding that it was the purpose of Congress under Section 8(a)(3) to protect employers as well as employees from employer discrimination. And if an employer does not violate Section 8(a)(3) by terminating a business relationship with another employer, union pressure merely designed to achieve such an end would not violate Section 8(b)(2).
>
> Of course, the Act is not wholly unconcerned about the interruptions of business relationships caused by labor disputes. Where a union strikes, or induces employees to strike, in order to cause a cessation of business between a neutral employer and the employer with which it is in dispute, there is secondary activity for which Section 8(b)(4) was designed and which is made unlawful by that section * * *.

[31] CDTOA correctly observes (Br. 32-39, 56) that there are many situations in which the Board has ordered unions to reimburse employers or employees for losses caused by unfair labor practices. However, it cites no case where reimbursement has been ordered on behalf of one business entity for losses caused by conduct of another. Moreover, since Terra was not even a respondent in the Board proceeding and was not found to have violated Section 8(e), it is doubtful that the Board in any event could have ordered Terra to reimburse petitioner for the monies that he paid to the Union.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Respondent's Brief

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No. 81-1627

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LARRY SHEPARD,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION; et al.

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit.

BRIEF OF RESPONDENT CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION

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QUESTIONS PRESENTED

1. Where enforcement of an unlawful "hot cargo" labor agreement in violation of Section 8(e) of the National Labor Relations Act, as amended, ("Act") compels independent contractors, against their will, to join the union, pay dues and initiation fees and pay contributions to union trust funds or be denied the opportunity to perform services for other contractors who are signatory to such unlawful "hot cargo" agreement, may the National Labor Relations Board ("Board") properly order the parties to such agreement to reimburse all such independent contractors for those dues, initiation fees and contributions to union trust funds paid by them?

2. If the answer to the foregoing question is in the affirmative, must the Board enter such

an order to fulfil its legislative mandate to effectuate the purposes of the Act; or may it simply order the parties to the unlawful agreement to stop enforcing their agreement to the extent it is unlawful and permit them to retain the fruits of their prior illegal actions?

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STATEMENT OF THE CASE

On December 19, 1977, California Dump Truck Owners Association ("CDTOA"), an unincorporated association of independent owner-operators of dump trucks, filed a charge with the NLRB alleging that Building Material and Dump Truck Driver, Teamsters Local Union No. 36, etc. (the "Union"), and three associations of employers who are contractors in the building and construction industry in San Diego County, California, (the "Associations")/1 had violated Section 8(e) of the National Labor Relations Act by agreeing to cease and ceasing to do business with the owner-operators. (J.A. 18, 29.)

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1. The Associations are the Associated General Contractors of America, San Diego Chapter, Inc., San Diego Building Contractors Association, and Engineering and General Contractors Association.

On October 20, 1978, Larry Shepard, an individual dump truck owner-operator, filed a similar charge against the Union, also asserting that the Union had violated Section 8(b)(4) of the Act. (J.A. 28)

On January 29, 1979, the NLRB consolidated the two charges for trial and issued a complaint alleging that the Union and the Associations had violated Section 8(e). (Pet. Cert., App. B 19a.) The matter was tried before Administrative Law Judge Russell L. Stevens on August 27, 1979. (Pet. Cert., App. B 43a.) Following the evidentiary hearing, the parties submitted briefs, and on October 30, 1979, Judge Stevens issued his Decision, finding that the Union and Associations had in fact violated Section 8(e). In addition to a narrow cease-and-desist order and the posting of notices, Judge Stevens recom-

mended that the Union and the Associations, jointly and severally, be ordered to make whole the owner-operators for their enforced payments to the Union of dues, initiation fees, assessments and contributions to Union benefit funds, together with interest computed in the Board's customary manner.

Exceptions were taken, and the matter was submitted to the Board, which rendered its decision on May 8, 1980. (Pet. Cert., App. B 15a.) Expressly affirming the rulings, findings and conclusions of Judge Stevens (with one immaterial exception), the Board adopted his recommended Order in most respects, but expressly deleted Judge Stevens' proposed make-whole reimbursement order. (Pet. Cert., App. B 16a-17a & n.2.)

The Union, Shepard and CDTOA all petitioned for review, the Board

cross-petitioned for enforcement, and on December 4, 1981 the United States Court of Appeals for the District of Columbia Circuit entered its decision denying the petitions and ordering enforcement of the Board's order without modification of the Board's remedy. (Pet. Cert., App. A 1a.) Petitioner Larry Shepard filed a timely petition for a writ of certiorari on the "remedy" issue, which was granted by this Court on May 17, 1982.

The underlying facts of the case can be briefly stated. The Union is a labor organization within the meaning of Section 2(5) of the Act, and purports to represent employees in San Diego County, California. (J.A. 30-31, 37, 47.) The Associations and their employer members are employers engaged in commerce within the meaning of the Act. Id. At all times relevant, the

Union and the Associations have been parties to a collective bargaining agreement governing work performed by dump truck operators in San Diego County. The most recent of those agreements (the "Master Labor Agreement" or "MLA") covers the period from 1977-1980 and contains certain provisions which were found by the NLRB in the proceeding below to violate the "hot cargo" provisions of Section 8(e) of the Act. (J.A. 31-35, 37-38, 47; Pet. Cert., App. B 15a.) These provisions were originally included in the collective bargaining agreement between the Union and the Associations in 1972. (J.A. 114.) They were continued in the 1974 MLA and the current 1977-1980 MLA. (Id.) In addition to the so-called "hot cargo" language, the MLA contains traditional union-security language, which requires employees to become members of

the Union and to pay dues and initiation fees as a condition of employment. (J.A. 1-11.)

Based upon undisputed evidence, the Administrative Law Judge and the NLRB have found that the dump truck owner-operators were independent contractors, and not employees within the meaning of the Act. (Pet. Cert., App. B 30a-31a, 15a.) Nevertheless, the MLA defined these independent contractors as employees and required them to join the Union and pay initiation fees and dues, and required the Association employers to make contributions to Union benefit plans on their behalf. Moreover, unrebutted testimony established that the MLA was enforced against the owner-operators and that they were in fact compelled to join the Teamsters and pay dues and initiation fees or be

denied work. (J.A. 56-59, 71-73, 75-79, 87-89.)

On this undisputed evidence, the Administrative Law Judge found that the purpose and effect of numerous provisions of the Master Labor Agreement was to achieve precisely the ends forbidden by Section 8(e). (Pet. Cert., App. B 37a, 44a.) The Administrative Law Judge also found that under the agreement, as it was actually enforced by the Union and the Associations, an independent "owner-operator has only two choices, i.e., he can become an employee [and a union member] against his will and thereby subject himself to all the limitations of such status, or he can be precluded from hauling for signatory contractors, thereby effectively taking himself out of the hauling business." (Pet. Cert., App. B 37a.) Through the Master Labor Agreement, as enforced, the

Union and the Associations have attempted to impose union membership on owner-operators, and have been successful in doing so. Independent owner-operators (including Shepard) joined the Union and this union membership of owner-operators, resulted from illegal provisions of the Master Labor Agreement. The Board expressly affirmed the rulings, findings and conclusions of the Administrative Law Judge, with specified exceptions not here relevant, except for the refusal to order the "make whole" remedy which is the subject of the proceeding in this Court. (Pet. Cert., App. B 15a-19a.)

SUMMARY OF ARGUMENT

In the proceeding before the Board and in the appellate proceeding before the District of Columbia Circuit, the petitioner herein and CDTOA sought the remedy recommended by the Adminis-

trative Law Judge wherein the Union and the employer associations were required to reimburse the owner-operators for the initiation fees, dues, assessments and contributions to Union trust funds required of them as a result of the unlawful enforcement of the collective bargaining agreement. (Pet. Cert., App. A 1a, 3a.) The Board declined to order such remedy and instead simply ordered the parties to cease and desist from enforcing their collective bargaining agreement to the extent that it was unlawful. The District of Columbia Circuit refused to disturb the Board's remedial order relying upon Virginia Electric & Power Co. v. NLRB, 19 U.S. 533 (1943) and upon Local 60, United Brotherhood of Carpenters & Joiners v. NLRB, 365 U.S. 651 (1961) [hereinafter "Carpenters Local 60."]. (Pet. Cert., App. A 3a, 11a-14a.) The first question

is whether the Board could issue an order for the make whole remedy.

The statute itself establishes the inner limits of the Board's authority at Section 10(c) of the Act when it provides that upon finding that there has been an unfair labor practice, the Board shall issue an order requiring the cessation of the unfair labor practice and "to take such affirmative action . . . as will effectuate the policies of this Act . . . ." 29 U.S.C. § 160(c). With respect to the question of reimbursement, payment of Union dues, fees, assessments and contributions, Virginia Electric & Power Company v. NLRB establishes that the Board may properly issue such an order where such payments were compelled as a consequence of the commission of unfair labor practices. 319 U.S. at 541. Carpenters Local 60 establishes an outer limit by

prohibiting such a remedy where the persons who made the payments were not coerced or compelled to make the payments as a consequence of an unfair labor practice, because such an order would not remove the "consequences of violation" or dissipate the effects of the prohibited conduct. 365 U.S. at 655. Accordingly, the make whole remedy could have been ordered in this case.

Moreover, a simple analysis of the circumstances of the case confirm that a make whole remedy, would in fact effectuate the purposes of the Act. In point of fact, it is probably the best way to effectuate the prohibition against hot cargo agreements such as the agreement in this case. The failure to issue an order requiring that the independent owner-operators be made whole for the payments they were forced to make to the Union neither corrects the

effects of the unlawful conduct of the Union in enforcing the illegal agreement nor does it serve to discourage the Union from a repetition of its efforts to unlawfully interfere in the business relationship between the owner-operators and the contractors with whom they deal.

Not only does the Board have the power to order such a remedy, it has repeatedly exercised that power in analogous cases in the past. Local 814, Teamsters (Santini Bros.), 208 NLRB 184 (1974), enfc'd, 546 F.2d 989 (D.C. Cir. 1976), cert. denied, 434 U.S. 818 (1977), is closely analogous to the instant case and for all practical purposes is not distinguishable. There the Board did order a make whole remedy for owner-operators. The District of Columbia Circuit noted in this proceeding that Santini Bros. involved alleged violation of Section 8(b)(4)(ii)(A),

which was not alleged in the instant case. (Pet. Cert., App. A 13a.) Then it proceeded to rely upon Carpenters Local 60 for the proposition that "in those circumstances" a make whole remedy was beyond the power of the Board. Id. However, reference to the cited portion of the Carpenters Local 60 decision indicates that the "circumstances" referred to by this Court was simply the fact that the remedy would not remove the consequences of violation or dissipate the effects of the prohibited action. Carpenters Local 60 v. NLRB 365 U.S. at 655. In this case, as indicated previously, that result would follow from the make whole remedy. Accordingly, Carpenters Local 60 supports the petitioner in this case, not the Board.

The final issue then becomes whether once it is recognized that the

Board had the power to issue the order and once it is recognized that a make whole remedy order would effectuate the purposes of the Act, the Board may refuse to enter such an order and ignore the Congressional instruction to take affirmative action to effectuate the policies of the Act. The Board has failed to articulate any logical explanation for its refusal to enter the make whole remedy, but has simply asserted that such a remedy would be "generally overbroad and inappropriate in the context of Section 8(e) violations." (Pet. Cert., App. B 17a n.2.) Accordingly, where there is no rational explanation for the failure to provide what has already been established as an adequate remedy that would effectuate the purpose of the Act, and where the Board's own precedent would require the issuance of a make whole remedy under the circum-

stances of this case, the Board should be required to modify its order to provide the appropriate make whole remedy or articulate a cogent, rational, comprehensible and justifiable basis for its decision not to issue such an order.

ARGUMENT

I. THE BOARD HAD THE POWER TO ORDER THE MAKE-WHOLE REMEDY AND ITS REFUSAL TO DO SO FAILS TO EFFECTUATE THE POLICIES OF THE ACT.

One must begin analysis from the premise that the "Board has broad discretion to adapt its remedies to the needs of particular situations." Carpenters Local 60 v. NLRB, 365 U.S. 651, 655 (1961). Admittedly, such discretion in the choice of remedies, although wide, "is not without limits." International Union of Electrical, Radio & Machine Workers v. NLRB, 383 F.2d 230, 233 (D.C. Cir. 1967), cert. denied, 390 U.S. 904 (1968).

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), expressly provides that when the Board finds a person has committed an unfair labor practice, it "shall issue . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies" of the Act. (Emphasis supplied.) The Section's language is mandatory, not permissive. The Board's remedial discretion is based on the fact that its experience presumably gives it "advantages in determining how best to relate 'remedy to policy.'" Textile Workers Union v. NLRB, 475 F.2d 973, 976 (D.C. Cir. 1973), quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). But once an unfair labor practice has been found, the Board does not have discretion to refuse to require affirmative

action that will "effectuate the policies" of the Act; it "must issue an order" satisfying the statutory mandate of Section 10(c). Textile Workers Union v. NLRB, 475 F.2d at 975-76 (emphasis supplied).

It is well established that "[t]his grant of remedial power is a broad one," NLRB v. Strong, 393 U.S. 357, 359 (1969), and authorizes a wide range of types of affirmative relief. There can be no dispute here over the Board's power to order a make-whole remedy. Indeed, making victims whole "for losses suffered on account of an unfair labor practice is a part of the vindication of the public policy which the Board enforces." Phelps Dodge Corp. v. NLRB, 313 U.S. at 197; NLRB v. Strong, 393 U.S. at 359.

The Board's exercise of remedial discretion must always be measured

by the nature and purpose of its power under Section 10(c). That section "charges the Board with the task of devising remedies . . . to undo the effect of violations of the Act." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) (emphasis supplied). Accord, Carpenters Local 60 v. NLRB, 365 U.S. at 655. The primary purpose of the affirmative remedy authority in Section 10(c) is to enable the Board to take appropriate measures designed to recreate the conditions that would have existed had there been no unfair labor practice. See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938). See also Carpenters Local 60 v. NLRB, 365 U.S. at 657 (Harlan, J., concurring), and cases cited; Office and Professional Employees International Union v. NLRB, 419 F.2d 314, 322 (D.C. Cir. 1969).

As the District of Columbia Circuit has expressed it, the primary purpose of a Section 10(c) "remedy must be the restoration of the status quo to the greatest extent practicable;" and "the basic purpose of restoring the status quo is to redress the injury" done by the unfair labor practice. International Ladies' Garment Workers Union v. NLRB, 374 F.2d 295, 300 (D.C. Cir., 1967), cert. denied, 387 U.S. 942 (1967) and 395 U.S. 980 (1969), and cases cited. An additional purpose of the 10(c) remedy is to provide an "aid of the Board's authority to restrain violations." Carpenters Local 60 v. NLRB, 365 U.S. at 655. Although the deterrence of future violations may not alone be sufficient to justify a Section 10(c) order, a proper remedial order that serves such an end obviously effectuates the purposes of the Act.

The reimbursement remedy proposed by CDTOA and rejected by the Board would recreate the conditions that would have existed had there been no unfair labor practice, redress the injury done to the independent owner-operators by the illegal conduct, and assist in preventing future violations. None of these things can adequately be achieved without such a remedy. The undisputed evidence before the Board plainly establishes that independent owner-operators were were forced to join the Union and pay initiation fees, dues, assessments and other contributions to the Unions, by the unlawful enforcement of the Master Labor Agreement, in violation of Section 8(e). In such circumstances, a make-whole remedy is entirely appropriate.

Perhaps most significantly from the viewpoint of effectuating the

purposes of the Act, the Board's remedy decision cannot possibly assist in avoiding future violations of the Act. The battle to force unlawful unionization on the independent owner-operators has been going on for years. The Board's order requires the Union and the Associations only to cease-and-desist from enforcing the specific unlawful terms of the expired Agreement, and to post notices saying that they will do so.

Nothing in the Board's Order prohibits the Union and Associations from entering a new agreement with slightly different language, but which can be enforced in exactly the same way. The Associations will have no reason <u>not</u> to do so. The Union will have a real positive incentive to continue violating the law, because the Board has decreed that it deems it "inappropriate" to

require the Union to disgorge the profits of its illegal conduct. If a party proven to have committed an unfair labor practice "is permitted to retain the fruits of unlawful action, the Act is rendered meaningless, and defiance of the board's orders is encouraged." NLRB v. International Longshoremen's and Warehousemen's Union, 451 F.2d 1240, 1243 (9th Cir. 1971); Graphic Arts International Union, Local No. 280 v. NLRB, 596 F.2d 904, 910 (9th Cir. 1979). In circumstances such as these, where a make-whole remedy would do no more than compensate the victims of unfair labor practices for their losses and take "the profit out of unfair labor practices," see BNA Lab. Rel. Yearbook 1978, at 19 (quoting Board Chairman Fanning), its suitability and necessity to effectuate the policies of the Act is manifest. As the Board itself put it, in the similar

circumstances presented in Warehousemen's Union Local 17, 182 NLRB 781, 787 (1970), enforced, 451 F.2d 1240 (9th Cir. 1971), a bare cease-and-desist order "permit[s] the Union to retain the fruits of its unlawful conduct and [would] constitute little if any effective remedy of [the] continuing unfair labor practices."

It is respectfully submitted that the circumstances presented in this case warrant the same remedy approved by this Court in Virginia Electric & Power Co. v. National Labor Relations Board, 319 U.S. 533 (1943). In that case, the employer, in violation of the Act, had assisted and recognized an "independent" union and discriminated against the proponents of an outside union. The employer entered into a closed shop union security agreement with the favored union and also provided for a

check-off of dues. As a part of its remedy, the Board ordered the employer to reimburse its employees for the amounts checked off from their wages and paid to the favored union as a consequence of the employer's unfair labor practices. This Court affirmed the Board's finding that the employer had dominated and interfered with the favored union. 319 U.S. at 538-39. The Court went on to conclude that the Board's finding that the reimbursement of the dues to the employees was necessary to effectuate the purposes of the Act, and, approving the remedy ordered by the Board, this Court used language, which with very slight modification could be directly applicable to the instant case.

> "[The Board] had here determined that, to effectuate fully the policies of the Act, it is necessary to expunge the effects of the

> unfair labor practices ordering the reimbursement of checked-off dues. Such a determination seems manifestly reasonable. It returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the company whose unfair labor practices brought about the situation."

319 U.S. at 541.

Thus, the Virginia Electric case established that reimbursement of dues to the victims of an unfair labor practice is within the outside limitations of the Board's discretion to devise appropriate remedies. However, Carpenters Local 60 v. NLRB, 365 U.S. 65 (1961), was relied upon both by the Board and by the United States Court of Appeals for the District of Columbia Circuit as authority for the proposition that such a remedy is inappropriate in the case of the owner-operators. It is respectfully submitted that Carpenters

Local 60 in no way qualifies the fundamental applicability of the principle of Virginia Electric & Power Co. to the instant proceeding.

In Carpenters Local 60 the employer had entered into a collective bargaining agreement that included an agreement to hire workers on referral from two local unions. In unfair labor practice proceedings below, the Board found that the petitioning unions had violated the Act by maintaining and enforcing an agreement which, through utilization of the hiring hall provisions, effectively established and maintained a "closed shop" preferential hiring procedure which prevented non-members of the unions from obtaining employment. 365 U.S. at 652. The Board ordered the unions to reimburse all employees for the dues, assessments and work permit fees collected by the union

pursuant to the unlawful contract. Id. at 652-653. Thus, persons who had voluntarily joined the unions and who had not been in any way affected by the unlawful hiring hall provisions would have received a windfall in the form of a reimbursement of dues. This Court distinguished that situation from the Virginia Electric & Power Co. case on the following ground:

> But there is no evidence that any of [the unions] coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. (emphasis added)

365 U.S. at 654. Mr. Justice Douglas went on to explain the basis for the decision not to enforce the order

requiring reimbursement in the circumstances of that case.

> Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no "consequences of violation" are removed by the order compelling the union to return all dues and fees collected from the members; and no "dissipation" of the effects of the prohibited action is achieved. National Labor Relations Board v. District 50, United Mineworkers, supra, 355 U.S. 463, 78 S. Ct. 392. The order in those circumstances becomes punitive and beyond the power of the Board. [citation omitted, footnote omitted.]

365 U.S. at 655.

Thus, Virginia Electric & Power Co. still stands for the proposition that, where membership in the union was influenced or compelled by reason of an unfair labor practice, reimbursement of dues and fees incurred thereby would effectuate the purposes of the Act and

return the parties to the status quo ante.

Accordingly, there is no case law that prohibits the granting of the remedy sought by the dump truck owner-operators. The only distinction between the circumstances presented by Mr. Shepard and the other dump truck owner-operators not present in the preceding two Supreme Court cases is the fact that these gentlemen are independent contractors rather than employees. It is respectfully submitted that that is a distinction without a difference. Section 8(e) of the National Labor Relations Act was enacted for the purpose of prohibiting the coercion of independent contractors such as Mr. Shepard and the other dump truck owner-operators by unions and employers through "hot cargo" agreements. Thus, one of the purposes of the Act, as

enacted, was to prevent the type of coercion to which the owner operators were subjected in the instance case. The make whole remedy would, therefore, effectuate the purposes of the Act and is within the scope of the Board's discretion to fashion remedies for unfair labor practices.

II. THE BOARD'S REFUSAL TO ORDER A MAKE-WHOLE REMEDY IS INCONSISTENT WITH ITS OWN PRECEDENTS.

A decision of the Board on the remedy it orders, no less than its resolution of factual questions or its legal conclusions concerning violations, must be a "rational" product of "conscious choice" among the alternatives available. See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962). One of the well-established implications of that principle is that "'Reviewing courts . . . are not to abdicate the conventional judicial func-

tion,' including the responsibility placed on them by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), to prevent capricious determinations by administrative agencies." NLRB v. General Stencils, Inc., 438 F.2d 894, 904 (2d Cir. 1971), quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

The necessity of a reasoned, noncapricious choice of remedies means that the Board cannot "treat similar situations in dissimilar ways." Burinskas v. NLRB, 357 F.2d 822, 827 (D.C. Cir. 1966) (footnote omitted). Accord, Acco Construction Equipment, Inc. v. NLRB, 511 F.2d 848, 852 (9th Cir. 1975); Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). As the Second Circuit has held, even the Board's most widely discretionary remedy decisions "are not immune from the great principle that like cases must receive

like treatment." NLRB v. General Stencils, Inc., 438 F.2d at 904-05.

CDTOA submits that in these proceedings, the Board has patently departed from this principle. Over the years, the Board has consistently effectuated the policies of the National Labor Relations Act by ordering reimbursement of losses which the victims of unfair labor practices have suffered as a result of those practices. It has applied that remedy in varying circumstances, by no means limited to any single type of unfair labor practice. Three examples are illustrative.

In Graphic Arts International Union, Local 280, 235 NLRB 1084 (1978), enforced, 596 F.2d 904 (9th Cir. 1979), a union unlawfully induced an employer to abandon multi-employer contract negotiations and bargain alone. The Board

required the union to make the employer whole for all financial expenditures made under its collective bargaining contract that it would not have had to make under the multi-employer contract.

In Local 964, United Brotherhood of Carpenters and Joiners, 181 NLRB 948 (1970), enforced, 447 F.2d 643 (2d Cir. 1971), a union unlawfully insisted that a collective bargaining agreement provide for contributions to an industry advancement fund and a separate trust fund. The Board expanded its trial examiner's suggested remedy, and ordered that the employer be made whole for all its contributions to both funds. The Board's expressed rationale was that it had "consistently ordered such reimbursement" where a union unlawfully imposed a contract requiring contributions. Id. at 948 n. 3. Local 80, Sheet Metal Workers International, 161

NLRB 229 (1966), is to precisely the same effect.

A single principle explains these (and many other) comparable Board remedies: When an unfair labor practice forces its victims to incur a definite loss, the Board has found that make-whole reimbursement effectuates the purposes of the Act. And there is nothing whatsoever novel about the proposition that payments made to labor unions should be reimbursed in such circumstances. To the contrary, the Board has constantly ordered reimbursement to those who have wrongfully been induced to join or make payments to labor organizations. Once again, there is no single unfair labor practice for which such a remedy has been ordered; the unifying principle is simply that an unfair labor practice has required its victims to make payments to a union.

In Lunardi-Central Distributing Co., Inc., 161 NLRB 1443 (1966), the Board ordered the employer to reimburse its employees for all dues, assessments and other amounts withheld from paychecks for an unlawfully assisted union, along with initiation fees for those employees who joined the union as a result of specific coercion or by reason of the union-security agreement between the company and the union. Likewise, in J. J. Hagerty, Inc., 139 NLRB 633 (1962), enforced in part, 321 F.2d 130 (2d Cir. 1963), the Board ordered a union to reimburse permit and service fees which individuals had been compelled to pay as a result of discriminatory hiring hall arrangements, and to make whole those discriminatees who had wrongfully been denied welfare benefits.

In Passaic Daily News, 222 NLRB 1162 (1976), an employer who had modernized his production facilities failed to maintain the requisite neutrality between two rival unions, and entered into a collective bargaining agreement with its largest existing union. The agreement contained a union-security clause, requiring employees whose jobs were reclassified in the modernization (and who had previously been members of the rival union) to join the company's main union. The company and that union were jointly and severally ordered to reimburse all employees who joined the union and paid money to it under the union-security clause in the contract, for their initiation fees, dues, and other monies paid or checked off.

In Komatz Construction, Inc., 191 NLRB 846 (1971), enforced as

modified, 458 F.2d 317 (8th Cir. 1972), a company mistakenly granted recognition to a union that did not have majority support. The resulting contract required employees to join the union, and the Board ordered the company to reimburse all union dues paid by those who did.

In Sheraton-Kauai Corporation, 172 NLRB 25 (1969), enforced, 429 F.2d 1352 (9th Cir. 1970), a company and its union extended their existing state-wide collective bargaining agreement, which contained a union-security clause, to a newly established location. The Board found that the extension was improper, and ordered the employer and the union to reimburse employees for union initiation fees and dues. Enforcing the order, the Court held that

> "[t]he Board's approach effectuates the policy of the Act, for it 'returns to the

> employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company [and Union] whose unfair labor practices brought about the situation.'"

429 F.2d at 1358, quoting Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 541 (1943).

There is no need to burden this Court with the details of numerous other cases in which the Board has reached precisely the same result, ordering reimbursement of unfair labor practice victims who have been forced to make payments to unions. It suffices to indicate that they exist, in substantial number. See, e.g., American Beef Packers, Inc., 176 NLRB 338 (1969), enforced, 438 F.2d 331 (10th Cir. 1971) (per curiam), cert. denied, 403 U.S. 919; Jan Power, Inc., 173 NLRB 798 (1968), enforced, 421 F.2d 1058 (9th Cir. 1970); Raymond Buick, Inc., 173

NLRB 1292 (1968), enforced, 445 F.2d 644 (2nd Cir. 1971) (per curiam); Hughes & Hatcher, Inc., 159 NLRB 1202 (1966), enforced in part, 393 F.2d 557 (6th Cir. 1968); Harold W. Koehler, et al., 139 NLRB 945 (1962), enforced as modified, 328 F.2d 770 (7th Cir. 1964); Reliance Fuel Oil Corp., 129 NLRB 1166 (1961), enforcement denied for jurisdictional reasons, 297 F.2d 94 (2d Cir. 1961) (reimbursement would be "appropriate under the circumstances," but for jurisdiction), rev'd. on jurisdictional grounds, 371 U.S. 224 (1963); Burke Oldsmobile, Inc., 128 NLRB 79 (1960), enforced as modified, 288 F.2d 14 (2nd.Cir. 1961); NLRB v. Wells, 283 F.2d 689 (6th Cir. 1960).

In the light of the Board's consistent exercise of its Section 10(c) powers to order make-whole reimbursement where the victims of unfair labor prac-

tices were wrongfully induced to suffer losses or to join and make payments to a labor union, its Decision and Order here is difficult to understand. The undisputed evidence establishes, and the Board has found, that independent owner-operators have been forced by the Union's and Associations' unfair labor practices to forego their livelihood or join and make payments to the Union. The Board's own precedents establish that it would effectuate the purposes of the Act to order reimbursement. Yet, the Board refuses to provide a meaningful remedy. That would require an explanation even if reimbursement had never been ordered in a "hot cargo" case. In fact, however, the Board has ordered a make-whole remedy in at least two "hot cargo" cases.

In Sheet Metal Workers International Association, Local Union No.

223, 196 NLRB 55 (1972), remanded on other grounds, 498 F.2d 687 (D.C. Cir. 1974), modified with reimbursement order continuing, 214 NLRB 786 (1974), a union had enforced its collective bargaining agreement (which was unobjectionable on its face) by refusing to perform work on products which did not bear a union label, and demanding that contractors make payments to equalize their cost on the products to that of comparable union-label products. Although its trial examiner had not recommended reimbursement, the Board determined that the purposes of the Act could "best be effectuated by requiring [the union] to make whole the employers from whom the monetary penalties were unlawfully exacted." Id. at 57. The Board explained its decision by noting its consistency with the many other cases in which it had ordered reimbursement when

unfair labor practices had compelled monetary payments: "As in other situations where a labor organization has by conduct violative of the Act forced persons to make monetary payments, we shall require" make-whole reimbursement, "together with interest at 6 percent per annum." Id. at 57. This, of course, is precisely the principle which the independent owner-operators unsuccessfully asked the Board to apply in this case.

In the consistent context of decisions providing make-whole remedies in such circumstances, the Board's Santini Brothers decision was hardly surprising. Local 814, International Brotherhood of Teamsters, etc. (Santini Brothers, Inc.), 208 NLRB 184 (1974), remanded for clarification, 512 F.2d 564 (D.C. Cir. 1975) (per curiam), order affirmed, 223 NLRB 752 (1976), enforced, 546 F.2d 989 (D.C. Cir. 1976) (per

curiam), cert. denied, 434 U.S. 818 (1977). Santini Brothers involved the long distance household goods moving industry in New York City. Very much like this case, the matter arose from attempts by a Teamsters local union to enforce unionization on independent owner-operators of truck tractors. The owner-operators had contracted with Santini Brothers to load, haul and unload household goods in long-distance moves. In an attempt to force them to join the union, the Teamsters initiated a brief work stoppage at one of Santini's facilities. The strike ended the same day it began, when Santini agreed "to undertake to obtain signed union membership applications from the owner-operators and to refuse to 'load' those who did not sign." Id. at 184. To effectuate his agreement with the union, Santini advised the owner-

operators of his dilemma and stated that he would not be able to use their services if they did not join the union. Santini made no specific requests for the owner-operators to join the Union. Id. at 189. "Some owner-operators signed up; but others refused to join the Union, and Santini in turn refused to allow them to load in New York." Id. at 184.

Based on this record, the Board affirmed the rulings, findings and conclusions of its Administrative Law Judge, and adopted his recommended order. Id. at 184. The order expressly required the union to reimburse each of the Santini contract owner-operators (and any employees of such contractors) "for all initiation fees, dues, or other monies each may have been required to pay to the Union by reason of the enforcement" of Santini's agreement with

the Union, "together with interest at the rate of 6 percent per annum." Id. at 202.

No two cases are, of course, ever entirely alike in all respects, but it is difficult to imagine two cases more relevantly alike than Santini Brothers and the case at bar. In both cases, a Teamsters local union attempted to impose unionization on independent contractor owner-operators by pressure exerted through employer signatories to its labor contract. In both cases, the union and the employer entered into agreements which, as enforced, forbade the employer from using the services of non-union owner-operators. In both cases, the employer advised the owner-operators that their services could not be used unless they joined the union, and in both cases some owner-operators joined in response to

those pressures, and others lost their work by their failure to join. Yet in Santini, the Board applied its policy of ordering reimbursement to persons unlawfully forced to make monetary payments, and in this case it refused to do so. As explained more fully below, that refusal was wholly unjustified.

III. THE BOARD'S DECISION OFFERS NO MEANINGFUL OR SUPPORTABLE JUSTIFICATION FOR REJECTING THE MAKE-WHOLE REMEDY.

Whenever an administrative agency has a choice between two or more available remedies, it must explain the basis of the choice it makes, to indicate that it has in fact exercised its discretion within the bounds set by its statutory mandate. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-68. Its choice must be supported by findings, which in turn must

be supported by substantial evidence. Id. at 168.

Obviously, mere conclusory assertions that a particular remedy was selected or rejected in order to "effectuate the purposes of the Act" are insufficient.

> [T]o the maximum extent possible [the Board's Orders] should reflect the reasoning behind the remedies selected. . . . Effective appellate review, as well as judicial and administrative accountability, requires that the Board clearly articulate the reasons behind any order, and particularly why other remedies were found to be inappropriate.

NLRB vs. Pacific Southwest Airlines, 550 F.2d 1148, 1152 (9th Cir. 1977) (citations omitted). The Board's discretion in relating "remedy to policy" does not exempt it from the requirement that it support its decisions with adequate reasons. Textile Workers Union v. NLRB, 475 F.2d 973, 976 (D.C. Cir. 1973).

The Board's remedy decision here is patently inconsistent with its own established remedial principles and precedents. In such circumstances, judicial review of the Board's purported justification necessarily becomes even more demanding.

> "Merely asserting that the circumstances are 'unique' or 'unusual' does not provide a proper guideline for the future exercise of the Board's discretion nor does it provide a petitioner with an explanation why his case is being treated in a certain manner."

Burinskas v. NLRB, 357 F.2d 822, 827 (D.C. Cir. 1966). "More than enumeration of factual differences between cases is required; the [Board] must explain their relevance to the purposes of the Act." Id., 357 F.2d at 827 n. 5. Accord, Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965). See also Burlington Truck Lines v. United

States, 371 U.S. 156, 168 (1962). The Board cannot shirk its duty "to explain its imposition of a remedy in one case and its failure to do so in a seemingly similar--or even stronger--one on a basis reviewing courts can understand." NLRB v. General Stencils, Inc., 438 F.2d 894, 905 (2d Cir. 1971) (footnote omitted).

The few reasons the Board gave to "explain" its refusal to grant meaningful relief in this case are inadequate, unclear and accordingly warrant at the least a remand for a proper, comprehensible statement of its rationale. Of course, the Board's General Counsel will be limited to the Board's statement and may not speculate on what the Board might have said.

> "The courts may not accept appellate counsel's post hoc rationalizations for agency action; [Securities & Exchange Comm'n v.] Chenery

> [Corp., 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the Order by the agency itself: '[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . .' Ibid."

Burlington Truck Lines, Inc. v. United States, 371 U.S. at 168-69. See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971).

For the convenience of the Court, the Board's entire discussion of its choice of remedy is set out here:

> Finally, we shall delete language in the recommended order requiring Respondents, jointly and severally, to reimburse dump truck owner-operators for the payment of initiation fees, dues and contributions deducted for

> union benefit funds as a result of the enforcement of unlawful secondary provisions in Respondents' Master Labor Agreement. The Board has on one occasion adopted without comment an Administrative Law Judge's recommended Order containing such a remedy. Local 814, (Santini Brothers Inc.), [208 N.L.R.B. 184,] at 201. In the present case, however, there is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by Respondent. Furthermore, we find a reimbursement order, typically used to "make whole" employees for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators ordered by the Administrative Law Judge would not effectuate the remedial policies of the Act." [Citation to Carpenters Local 60, omitted.]

Pet. Cert., App. B, 16a n.2. With all due respect, CDTOA submits that this

"explanation" for denying a make-whole remedy does not withstand analysis.

In its Decision and Order, the Board noted that it had adopted the Administrative Law Judge's recommended Order in Santini "without comment." CDTOA is unable to understand what, if any, significance the Board intended to attach to that fact. CDTOA does not suppose that the Board means to say that it did not really consider the action it was taking in Santini, for that would amount to a confessed abdication of its duty. Furthermore, the Board does not even attempt to reconcile the inconsistency of its order here with its regular practice of requiring reimbursement of union dues, initiation fees and other monies individuals have lost by reason of unfair labor practices.

The Board offered only one attempted distinction to explain its

patent inconsistency with the Santini case, namely that "[i]n the present case . . . no evidence has been introduced with respect to alleged losses directly attributable to actual coercion by Respondent Unions, nor has the remedial issue been expressly litigated." CDTOA suggests that the Board cannot so easily dismiss the undisputed evidence in its record and, indeed, its own findings. That evidence, discussed above, makes it perfectly clear that the Union and the Associations coerced the independent owner-operators by their enforcement of the Master Labor Agreement. The Union unlawfully presented the owner-operator with only two choices, to join the Union against his will, or to be precluded from engaging in the hauling business. Some owner-operators joined the Union as a result of this illegal pressure, and

others lost work because they refused to do so. This is precisely the situation which appeared in the record of the Santini case. In these circumstances, the Board has repeatedly found coercion and ordered dues and fee reimbursement outside the "hot cargo" context. See cases cited at pp. 29-35, supra.

In its Decision and Order, the Board further attempted to explain its choice of remedy by stating that reimbursement orders are "typically used to 'make whole' employees for violations of the Act." (Emphasis in original.) With all appropriate deference, CDTOA submits that this argument makes no sense whatsoever. Obviously, an individual who has lost money or been forced to make payments to a union will often be an employee. But that is not always true, especially where "hot cargo" violations are concerned. The whole

purpose of the "hot cargo" statutes was to avoid placing independent third-parties in the vice of secondary boycott pressure from a union and an employer. This is not a case in which remote or incidental victims of an unfair labor practice attempt to bootstrap a right to reimbursement. The victimized owner-operators here, although not employees, are the very people the Act was intended to protect. For just such reasons, in Santini Brothers and Sheet Metal Workers, Local 223, both supra, the Board ordered reimbursement for unfair labor practice victims who were not employees.

Moreover, the Board has never limited the use of its Section 10(c) make-whole power to situations where employees were the victims. Without attempting any type of exhaustive listing, CDTOA notes that each of the

following cases discussed above involved a make-whole remedy expressly ordered by the Board for the benefit of an employer: Graphic Arts International Union, Local 280; Local 964, UBCJ; Warehousemen's Union Local 17; and Local 80, Sheet Metal Workers.

With reference to the Board's assertion that a make-whole remedy is "generally overbroad and inappropriate in the context of 8(e) violations," CDTOA makes only two comments. First, this is precisely the kind of "because we say so" conclusory utterance which the Courts have consistently rejected as a justification for the Board's choice of remedies. The Board nowhere explains why a make-whole remedy would be inappropriate to effectuate the purposes of the Act, for Section 8(e) violations. Moreover, whatever might be true in hypothetical "general" circumstances

involving a "bare" 8(e) violation, CDTOA and its members are entitled to a remedy that is appropriate in the context of the facts proven in this proceeding. This is not a case in which an illegal contract term was never enforced or, if enforced, never caused any injury. To the contrary, as discussed above, these independent owner-operators have been forced against their will to lose work or to join and pay money to the Union, by the Union's and Associations' violations of Section 8(e).

Without explaining its relevance, the Board "note[s] that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act." CDTOA submits that this proposition is immaterial to the Board's statutory mandate, totally impractical, and quite possibly incorrect.

Initially, in empowering the Board to remedy unfair labor practices, Congress expressly declared that the Board's "power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ." Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a). The courts have long held that this language means what it says. See NLRB v. Strong, 393 U.S. at 361.

It should be noted, moreover, that the "solution" reflected in the Board's reference to Section 303 is no solution at all. The amount of union dues, and assessments that any individual owner-operator has paid, and the profits he has lost in the appropriate period, will almost invariably be relatively small, and an individual federal

action to recoup that loss will seldom be economically feasible.

Finally, there is reason to doubt that a Section 303 action is available in the circumstances presented here. Section 303 authorizes litigation only for the victims of the unfair labor practices defined in Section 8(b)(4). (See 29 U.S.C. § 187). Section 8(b)(4), as pertinent, makes it an unfair labor practice for a labor organization to "threaten, coerce, or restrain any person" with the object of forcing an employer or self-employed person to join a labor organization. Because of the willingness of some Association members to participate in some of the illegal conduct in this case, the Union did not need to threaten, coerce or restrain them to get the Association members to coerce the owner-operators into joining the Union. It is, therefore, at least

possible that a court would hold that the Union's failure personally to threaten or coerce certain victimized owner-operators would bar their claim. If so, a Section 303 lawsuit may prove legally, as well as practically, unavailable.

Section 8(e) was added to the Act in 1959. When that occurred, Congress expanded the Section 303 right of action to allow recovery when a union engaged in secondary activity to force an employer to sign an agreement in violation of Section 8(e), but Section 303 still did not cover Section 8(e) violations standing alone. See Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975). Section 303 "is triggered only by violations of [Section 8(b)(4)]." Mishara Construction Co., Inc. v. International Brotherhood of

Electrical Workers, 554 F.2d 488 (1st Cir. 1977). Accord, National Maritime Union of America v. Commerce Tankers Corporation, 411 F. Supp. 1224, 1229 (S.D.N.Y. 1976), aff'd in pertinent part, rev'd in part on other grounds, 553 F.2d 793 (2d Cir. 1977), cert. denied, 434 U.S. 923 (1977):

> "For instance, the latter section would be violated where a labor union threatens, coerces or restrains an employer with the object of forcing or requiring the employer to enter into the Section 8(e) agreement. Similarly, Section 8(b)(4) would be violated if a labor union threatens, coerces or restrains an employer in order to force or require him to cease doing business with another party."

Id. (emphasis in original). Thus, no § 303 remedy would be available for at least some owner-operators, if the National Maritime Union court is correct. Accordingly, in addition to

all the other defects in the Board's justification of its remedy decision here, it appears to have been founded in part on an erroneous interpretation of law.

CONCLUSION

In short, the Board has found a serious violation of federal labor law in this case, but has refused to provide a meaningful remedy for it. It has allowed the Union to retain the benefits of its illegal conduct, and has given the Union and the Associations no reason whatsoever not to repeat that conduct, in slightly varied form, over and over again in the future.

This case involves essentially a review of limits. Although the Board has broad discretion in fashioning remedies, it must exercise that discretion within some fundamental limits.

> "Expert discretion is the life blood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." New York v. United States, 342 U.S. 882, 884 (dissenting opinion). "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." Federal Communications Comm'n v. RCA Communications, Inc., 346 U.S. 80, 90.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

The outer limits of the agency's discretion to fashion a make whole remedy in those situations where a union has compelled, or shall we say coerced, membership and other payments to it through illegal conduct were established in Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943). Carpenters

Local 60 v. NLRB, 365 U.S. 651 (1961), simply represents another interpretation of the outer limit of the Board's discretion to fashion a make whole remedy of the character sought in the instant case. The distinction between the facts of the Carpenters Local 60 case and the instant case are apparent and have been discussed above. They need not be repeated at this point. Thus, where individuals have been compelled to join a union as a result of an unfair labor practice and have paid dues, initiation fees and other contributions to such union as a consequence thereof, the reimbursement of those monies is not punitive and on its face would effectuate the purposes of the Act. It is therefore a remedy which is within the authority of the Board to grant.

The other side of the limit issue is the interior limit of the

Board's discretion. In the preceding paragraph we have reviewed how far the Board may go; the remaining issue is how far must it go. It is respectfully submitted that, although a rather simplistic starting point, the statute contains the answer. The Board is required to fashion remedies that effectuate the purposes of the Act. If its remedy goes beyond merely effectuating the purposes of the Act, as it did in Carpenters Local 60, it has abused its discretion and should be reversed. On the other hand, if the Board proffers a remedy which on its face does not effectuate the purposes of the Act, again the Board has abused its discretion and should be reversed.

The Board in numerous cases, some of which are virtually identical to the instant case, has deemed the make whole remedy sought by petitioner to

effectuate the purposes of the Act and to be, therefore, the appropriate remedy. The Board's prior determinations should be the standard to which the Board is held. Those prior decisions become the inner limit of the Board's discretion and create a presumption that in like cases a like remedy must be ordered. This is not to say that in the face of changed circumstances, experience or reevaluation of statutory goals the Board will be forever prohibited from changing its direction in the fashioning of remedies and its definition of what will best effectuate the purposes of the Act, once a particular course is set. However, in this case the Board has offered no indication that such a change of direction, such a rebuttal of the presumption of the propriety of the remedy, has occurred. In fact, an examination of

the record before this Court indicates that, in fact, there is no basis for providing a lesser remedy in this case. Accordingly, it is respectfully submitted that this case should be remanded to the Board with instructions to either grant the requested make whole remedy or to articulate meaningful and understandable reasons why this case does not warrant the make whole remedy it has found appropriate in so many of its prior, analogous decisions.

Dated: July 9, 1982

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By_____
Attorneys for California
Dump Truck Owners
Association

Respondent's Brief

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No. 81-1627

In the Supreme Court of the United States

October Term, 1981

LARRY SHEPARD,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION; et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36

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QUESTIONS PRESENTED FOR REVIEW

Teamsters Local 36, hereinafter referred to as "Local 36," does not agree with the question as presented by either the Petitioner Larry Shepard, hereinafter "Shepard," or as reframed by California Dump Truck Owners Association, hereinafter "Dump Truck Owners Association." Therefore, the following questions are presented:

1. Whether the Court of Appeals for the District of Columbia Circuit properly deferred to the expertise of the National Labor Relations Board in formulating the remedy that it did for a violation of Section 8(e) of the Act.

2. If not, what order should this Court make.

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STATEMENT OF THE CASE

Building Material and Dump Truck Drivers, Teamsters Local 36, petitioner and intervenor in the case below, hereinafter "Local 36," will not burden the record with a repetition of uncontested facts.

However, certain factual errors will be corrected. The California Dump Truck Owners Association asserts on page 5 of its brief that the provisions in question were originally included in the Collective Bargaining Agreement between the Union and the Associations in 1972. That is not factually correct. It is not even correct that provisions dealing with the owner-operators were first included in the 1972 Agreement. Respondent Exhibits Employer's 2, 3, and 4 to the Administrative Transcript show that the provisions in the 1972 Collective Bargaining Agreement were not the provisions being

challenged by the National Labor Relations Board in this case. Rather, the provisions in the 1972 Agreement were identical to the provisions challenged in Local 36 and the Griffith Company, 173 NLRB No. 62 (1968).

At this point it would be appropriate to put the terms of the Collective Bargaining Agreement in the historical context of the fluctuating status of the litigation surrounding the owner-operators.

In 1968 the National Labor Relations Board challenged certain provisions of the then current Master Labor Agreement, a predecessor to the Agreement being challenged in this litigation.

This language remained in the contract basically unaffected. That language in substance required that owner-operators, in fact, be the registered owner of equipment which they were

operating and that they establish this fact to Local 36. In Local 36 and the Griffith Company, supra, the Board said:

> "The general counsel alleged that the union, through its business representative, was demanding that three self-employed truck owner-operators become Teamster Union members, or that Griffith terminate its reliance on their services in connection with the Oceanside highway project."

In its decision the Board stated further:

> "The record clearly warranted a finding that the union's business representative, when he requested the employer to release the three drivers, based that request upon the union's contractually-defined right to require their clearance for project work as self-employed truck owner-operators."

After the Griffith decision, the National Labor Relations Board, in cases involving owner-operators in the Los Angeles area, held that, within the construction industry in Southern California, owner-operators were, in fact, not contractors but employees. General

Teamsters, Local 892 (J. K. Barker Trucking Co., 181 NLRB No. 515 (1970), affirmed Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D. C. Cir. 1971) and again, AGC, et al., 201 NLRB No. 311 (1973).

The legal significance of these decisions is that, while Section 8(e) regulates the relationship between contractors in non-job site work, it does not limit a union's right to bargain about the wages, hours, and working conditions for employees working on non-job site work.

Following the National Labor Relations Board's decision in these cases, the owner-operators themselves asserted their rights as employees in seeking decertifications. Tri-County Trucking, Case No. 21-RD-1235 (1975) (A 84-87) and Roczey Grading and Demolition, Case No. 21-RD-1286 (1975) (A 77-83). Thus, at

least some of the owner-operators adopted the attitude that, since the National Labor Relations Board said that they were employees, they were going to avail themselves of the rights of employees to have elections. Of course, independent contractors, as such, are not entitled to vote in National Labor Relations Board conducted elections among employees.

Against this background of Board rulings and court confirmation of the fact the Los Angeles owner-operators were employees and not independent contractors and the backdrop of the National Labor Relations Board's having conducted elections in San Diego and having treated owner-operators as employees, in June of 1974 the parties in collective bargaining negotiations treated owner-operators as employees with respect to all work covered by the Agreement (A 346).

Interestingly enough, in 1977 a panel of the Ninth Circuit Court of Appeals ruled that the owner-operator provisions in the Master Labor Agreement were valid under the antitrust laws because they were legitimate efforts by Local 36 to preserve bargaining unit work. See California Dump Truck Owners Association, Inc. v. AGC (Teamsters 36), 562 F.2d 607 (9th Cir. 1977).

A different panel of the Ninth Circuit Court of Appeals ruled in AGC v. NLRB, 564 F.2d 271 (9th Cir. 1977) that owner-operators in the Los Angeles area were not employees but, in fact, independent contractors. This decision was directly the opposite of the decision of the D. C. Circuit in Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D. C. Cir. 1971).

The decision of the Ninth Circuit in AGC was announced on October 11, 1977.

This was after the instant Collective Bargaining Agreement had already been negotiated (A 306). That Agreement was negotiated on the assumption that owner-operators were employees.

Subsequent to the decision of the Ninth Circuit, Local 36 took steps to insure that its portion of the Master Labor Agreement was applied only with respect to job site work and then only in strict conformity with the National Labor Relations Board's interpretation thereof. First, Local 36 entered into a Settlement Agreement in Operative Plasterers' and Cement Masons International Association, Local Union 744, Case No. 21-CE-195. And, in addition, Local 36 in August of 1978 entered into amendments to the Master Labor Agreement in an effort to further conform to changes in the law with respect to the construction industry exemption of subcontractor clauses within

the confines of Section 8(e) of the statute.

The owner-operators in question here had a higher rate for union jobs. This higher rate was to offset the sums deducted by the contractors for employee benefits (J.A. 79-80).

SUMMARY OF THE ARGUMENT

In the instant case the National Labor Relations Board has since 1959 consistently provided a cease and desist remedy and only a cease and desist remedy for violations of Section 8(e) of the Act. The District of Columbia Circuit Court properly deferred to the National Labor Relations Board's statutory mandate to apply the statute and provide remedies as mandated in Section 10 of the Act, as amended (29 U.S.C. §160).

That deferral is particularly

appropriate in the circumstances of this case in which a change in the legal status of owner-operators from employees to independent contractors caused a previously legal provision to become violative of the Act.

Accordingly, this Court should affirm the decisions of the Board and the District of Columbia Circuit in limiting the remedy in this action to the Board's traditional cease and desist order.

Should this Court find for some reason that the National Labor Relations Board has not fulfilled its statutory mandate, the matter should be remanded to the Board.

ARGUMENT

I

THE DETERMINATION OF THE BOARD TO LIMIT ITS REMEDY TO A CEASE AND DESIST ORDER SHOULD NOT BE DISTURBED

BY THIS COURT UNLESS THIS HONORABLE COURT FINDS THAT THE BOARD'S ORDER IS A PATENT ATTEMPT TO ACHIEVE ENDS OTHER THAN THOSE WHICH CAN FAIRLY BE SAID TO EFFECTUATE THE POLICIES OF THE ACT.

Petitioner's brief and the brief of Dump Truck Owners Association discuss at great length cases involving Sections 8(a)(1) and (5) of the Act and cases involving Section 8(b)(4) of the Act. The only Section alleged to have been violated in this case is Section 8(e). As the Court of Appeals for the Third Circuit said in Pyle, Inc. v. NLRB, 383 F.2d 772 (1967):

> "The scope of the prohibition of §8(e), however, is not to be found in the literal meaning of its broad language, but rather in its history and the circumstances out of which it arose, all of which has recently been described authoritatively by the Supreme Court in National

Woodwork Manufacturers Association v. NLRB, 368 U. S. 612 (1967)."

The briefs on file herein fail to cite a single case in which an 8(e) violation standing alone has led to anything more than a cease and desist order.

Likewise, the briefs on file herein fail to point to a single piece of legislative history in the 1959 Amendments to the Act which initiated the language which is now known as Section 8(e) of the Act. This omission is not unintentional. The fact is that an exhaustive review of the entire legislative history of Section 8(e) as set forth in the Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, United States Government Printing Office, Wash. 1959, establishes that, whichever form of legislation the various houses of Congress were discussing, the primary concern of the parties to the discussion was to eliminate

the hot cargo clauses themselves. Congress was not concerned about damages. Congress wanted to eliminate Jimmy Hoffa's stranglehold on commerce.

For example, Senate Bill 1385 in the 86th Congress proposed to make the execution of hot cargo clauses a criminal violation subject to fine of not more than $5,000 or imprisonment for not more than one year or both (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Vol. I, pp. 330-331).

Likewise, a comparison of the provisions of Public Law 80-257 (Section 8(e) as adopted) with the various bills dealing with hot cargo clauses set forth on pages 1916 and 1917 of the Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Vol. II, pp. 1916 and 1917 likewise reveals only the Congressional concern with outlawing the

hot cargo clause.

The Legislative History is replete with comments such as those on July 30, 1959 by Mr. Barden from the Committee on Education and Labor in the House of Representatives' Report No. 741 on House of Representatives' Bill 8342 at which on page 20 the Committee reported:

> "The committee bill would amend the National Labor Relations Act by outlawing 'hot cargo' clauses in labor contracts signed by common carriers subject to part II of the Interstate Commerce Act--i.e., those common carriers who transport goods in interstate commerce. The 'hot cargo' clause is one of the oppressive devices used by the Teamsters Union to spread its power. Outlawing this clause in the trucking industry would close a loophole in the present law against secondary boycotts.
>
> "The need for additional legislation outlawing the 'hot cargo' clause results from a gap in the National Labor Relations Act. Section 8(b)(4)(A) makes it an unfair labor practice for a labor union--
>
> 'to induce or encourage the employees of any employer

> to engage in a strike or a concerted refusal * * * to perform any services, where an object thereof is * * * forcing or requiring any employer * * * to cease doing business with any other person * * *

"The application of this prohibition is best illustrated by a concrete example. Suppose that company A trucks furniture over the road from terminals in Atlanta, Ga., to Philadelphia and New York and that company B manufactures furniture in Macon, Ga., which is taken to Atlanta and then carried north in A's trucks. If there were a strike at B's factory in Macon, it would be an unfair labor practice under the present law for the union which called the strike to go to Atlanta and induce A's truck-drivers to refuse to handle B's furniture on the ground that it was 'hot cargo.'

"But two essential elements of the present law are the inducement of employees by a labor union and a strike or concerted refusal to perform services. In the example, if the trucking company, A, simply refused to carry B's furniture there would be no unfair labor practice because there was no inducement of employees by the union.

"After the Taft-Hartley Act became law the Teamsters Union

began to exploit this distinction by the device of 'hot cargo' clauses. During negotiations the Teamsters would demand that the trucking firm, A, put a clause into the collective bargaining agreement agreeing generally that A would not truck nor require his employees to handle any freight which was 'hot' or 'unfair' because it came from an employer engaged in a labor dispute. It would be hard for A to resist this demand. Later the Teamsters could insist that A live up to the contract and refuse to handle freight such as B's furniture.

"From B's standpoint it makes no difference whether his furniture cannot be trucked out of Atlanta because the Teamsters induce A's employees to refuse to handle it or because A has been compelled to sign a contract not to handle hot goods. The injury to the public is also the same. The 'hot cargo' clause therefore became a major weakness in the law against secondary boycotts."

It is true that the language which Mr. Barden was discussing on July 30, 1959 was not the language which is ultimately included in Public Law 80-257. Subsequent reports by Mr. Barden such as Report No. 1147 on the subject of Senate

Bill 1555 state on page 39:

> "The House Amendment also makes any such agreement heretofore or hereafter executed unenforceable and void."
> [Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Vol. I, pp. 943]

And again, the Congressional Record, August 20-21, 1959 at page 15121, contains the remarks of Mr. Goldwater, then a senator from Arizona:

> "The provision of the House Bill makes the execution or inducement to perform any hot cargo agreement an unfair labor practice by unions and employers. Such conduct is subject to the mandatory injunction procedures of the Taft-Hartley Act. All such agreements are void and unenforceable . . ."
> [Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Vol. II, pp. 1360-1361]

In National Woodworks Mfg. v. NLRB, 386 U. S. 619 (1967) this Court analyzed in depth the efforts of Congress to plug a loophole in the then existing statute. That analysis confirms Congress' intent

to make "hot cargo contracts" null and void.

It is this legislative history and the language of Section 8(e) itself to which the Board has faithfully adhered since 1959 in granting only cease and desist relief under Section 8(e) of the Act. Given the legislative history and the Board's continued adherence to a cease and desist remedy in Section 8(e) cases, Local 36 respectfully submits that the Court of Appeals for the District of Columbia Circuit properly deferred to the expertise of the National Labor Relations Board in formulating its historic remedy in this area.

In Virginia Electric Company v. NLRB, 319 U. S. 533, the Court held that the considerable weight given to the Board's administrative determination required that determination to stand:

"unless it can be shown that the

> order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act . . ." (319 U. S. at 532)

Similarly, in National Labor Relations Board v. Walton Manufacturing, 396 U. S. 404, the Court stated:

> "We granted certiorari (368 U.S. 810, 812) because there was a seeming non-compliance by that court with our admonitions in Universal Camera Corp. v. Labor Board, 340 U. S. 474. We there said that while the 'reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view,' it may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' . . ."

And again, in National Labor Relations Board v. United Insurance Co. of America, 390 U. S. 254 (1968), the Court stated:

> "On the other hand, the Board's determination was a judgment made after a hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way. As we said in Universal Camera Corp. v. NLRB, 340 U. S. 474, 'Nor does it [the requirement for canvassing the whole record] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' 340 U. S., at 488. Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order. It was error to refuse to do so. Reversed."

Similar language is found in NLRB v. Rutter-Rex Mfg. Co., 396 U. S. 258 at 263, Golden State Bottling Company v. NLRB, 414 U. S. 168 (1973) at 181-182. See Ford Motor Co. v. NLRB, 441 U. S. 488 (1979) at 496-497. See also Charles

D. Bonanno Linen Service v. NLRB, No. 80-931, slip opinion p. 5-6 and NLRB v. Hendricks County Rural Electric Corp., slip opinion pp. 19-20.

In the instant case the Board, in footnote 2 to its decision, gave the following reasons for denying a make whole remedy in the instant case:

> 1. No evidence had been introduced with respect to alleged losses directly attributable to actual coercion by respondent unions.
>
> 2. The remedial issue had not been expressly litigated.
>
> 3. A remedial order typically used to make whole employees for violations of the Act is generally overbroad and inappropriate in the context of 8(e) violations.
>
> 4. That the owner-operators engaged in business as independent contractors and could pursue a damage claim under Section 303 of the Act.

Based on all of those reasons, the Board determined that the relief requested by the Dump Truck Owners would

not effectuate the remedial policies of the Act, citing Local 60, United Brotherhood of Carpenters Joiners of America, AFL-CIO, et al. v. NLRB, 365 U. S. 651 (1961).

Thus, the decision of the Board clearly enunciated specific reasons for its refusal to provide the requested remedy.

It cannot be said that a cease and desist order in this case is useless or meaningless.

In its Opinion the Court of Appeals for the District of Columbia Circuit aptly notes that, as a result of the Board's Order and the proceedings in the D. C. Circuit, both Local 36 and the various contractor associations are subject to contempt proceedings with respect to future violations. Thus, consistent with the Congressional design for enforcement of Board Orders, the cease and desist

order of the National Labor Relations Board carries contempt penalties and is, in effect, an injunction prohibiting a repetition of the conduct.

Such an injunction with possible sanctions is a far greater deterrent to future misconduct than merely paying money for a past violation.

Once the money is paid, the immediate inducement to avoid a repetition of the same conduct is removed. On the other hand, an injunction is an inducement for years to come. Thus, the Board in adopting a cease and desist order in this case, in fact, has furthered the policies of the Act by preventing similar conduct in the future.

This traditional approach by the Board, based on its twenty-two years experience with Section 8(e) of the Act, should be affirmed by this Court.

II

IN THE INSTANT CASE THE MAKE WHOLE REMEDY SOUGHT BY PETITIONER AND DUMP TRUCK OWNERS WOULD, IN FACT, WORK AS A PENALTY.

As the Statement of the Case sets forth, the history of friction between owner-operators and the Teamsters Union goes back well before the implementation of the present Collective Bargaining Agreement. There has been tension between owner-operators and driver employees for a substantial period of time. It would serve no useful purpose to repeat the names of cases but suffice it to say that, well prior to 1977, the issue had been litigated and re-litigated and re-litigated. It had been litigated before the Board; it had been litigated in the courts on both labor law issues and on antitrust issues.

At the time that the present contract was entered into in 1977, the contract was legal. At that time owner-operators who had contributions paid into the appropriate fringe benefit funds were presumably, pursuant to ERISA, provided benefits. There was no litigation on this issue before the Board. There was no evidence that owner-operators were denied medical benefits or pension credits or vacation checks. There was no evidence that owner-operators were denied the right to attend union meetings, vote on issues before the union, receive all of the other benefits of union membership. In fact, the Board processed employee petitions for elections at the request of owner-operators. To now require the Employer Association and the Union to refund to these individuals moneys which neither the Employer nor the Union ever received is certainly

punitive in nature.

Initially, it should be observed that the owner-operators in question had two rates. When they worked on a union job, they had a higher rate which was designed, in effect, to reimburse them for the fringes and other payroll deductions. When they worked on a non-union job where the deductions were not made, they worked at a lower rate. Thus, the owner-operators in question not only presumably received the benefits from the various funds but did so without any expense to themselves. To require the parties to the Agreement to reimburse them for these deductions at this point is unconscionable. All of these things were known to the Board at the point in time that it rendered its decision that in this case an order including something other than a cease and desist order was overbroad. Accordingly, the action of the Board and

the District of Columbia Circuit in upholding that action should be affirmed by this Court.

III

SHOULD THE COURT FIND THAT THE NATIONAL LABOR RELATIONS BOARD HAS SOMEHOW ABUSED ITS DISCRETION OR NOT ADEQUATELY EXPLAINED ITS POSITION, THE MATTER SHOULD BE REMANDED TO THE NATIONAL LABOR RELATIONS BOARD.

As the Court stated in NLRB v. Food Store Employees, 417 U. S. 1 at 10:

> "Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course. Application of that general principle in

> this case best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy. It also affords the Board the opportunity, through additional evidence or findings, to reframe its order better to effectuate that policy. . . ."

Thus, should this Court determine that in the Court's opinion the National Labor Relations Board has abused its discretion by omitting the remedy sought by the Dump Truck Owners Association and Petitioner, this case should be remanded to the Board.

CONCLUSION

Respondent Local 36 respectfully submits that the Board in this case correctly applied the statute and the legislative history as well as its mandate to formulate remedies to effectuate the policies of the Act in granting a cease and desist order which will

guarantee against a repetition of similar conduct. Accordingly, Local 36 requests that the action of the Court of Appeals for the District of Columbia Circuit be affirmed.

Dated: August 5, 1982

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No. 81-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SHEPARD, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

1. Is the National Labor Relations Board required to order a make-whole remedy when there is a bare Section 8(e) violation, in the absence of allegations and proof of coercion in enforcing an unlawful "hot cargo" agreement?

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No. 81-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY SHEPARD, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL.

APPLICABLE STATUTORY AUTHORITIES

The relevant statutory authority in this case is set forth in the Labor Management Relations Act, as amended (29 U.S.C. § 141, *et seq.*), at Sections 8(b)(4)(ii)(A), 8(e), 10(c), 10(l) and 303. It provides, in pertinent part:

Section 8: Unfair Labor Practices.

(b) It shall be an unfair labor practice for a labor organization or its agents . . .

* * * *

(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) . . . .

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . . .

* * * *

Section 10: Prevention of Unfair Labor Practices.

(c) If . . . the Board . . . shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act . . . .

* * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or

section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases . . . . If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law . . . .

Section 303: Boycotts and Other Unlawful Combinations.

(a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

I

STATEMENT OF THE CASE

A. Introduction.

The primary issue in this case is whether the National Labor Relations Board ("NLRB" or "Board") is *required* to order a make-whole remedy when there is a bare Section 8(e) violation, in the absence of allegations and proof of coercion in enforcing an unlawful "hot cargo" agreement. The case deals directly with the 1959 amendments to the National Labor Relations Act ("NLRA" or "Act"), which created a new Section 8(b)(4)(ii)(A) and Section 8(e). Section 8(e) was enacted to make hot cargo agreements, in and of themselves, unenforceable and void, and made no mention of coercion. Section 8(b)(4)(ii)(A) made union coercion to enforce agreements which violate Section 8(e) unlawful. Since the enactment of these provisions, the Board and reviewing courts have repeatedly held unions liable for damages when they violate Section 8(b)(4), but have never held employers or unions liable for damages for violation of Section 8(e), standing alone.

In the present case, Petitioner alleged, and the NLRB found, a violation of Section 8(e), standing alone. Petitioner now requests this Court to reverse longstanding precedent and act contrary to a clear statutory scheme by requiring the Board to order a union and an employer to make-whole a petitioner who alleged and proved a violation of Section 8(e).

To the extent that this Court determines that make-whole is an appropriate remedy for a bare Section 8(e) violation, this case further raises the issue if, contrary to precedent, equitable considerations and legislative intent, an employer should be held liable for make-whole damages.

B. Statement of Facts.

Petitioner was an owner-operator of a tractor, and hauled various types of materials for different contractors. Terra Trucking Company ("Terra") was a truck broker that referred

owner-operators to jobs in exchange for a fee. Terra was owned and operated by Fred ReCupido. Petitioner used Terra for brokering services and had a sub-haul agreement with Terra. (J.A. 81-83.)

ReCupido signed a "short-form" agreement in 1974 pursuant to the provisions of the San Diego County Master Labor Agreement ("MLA"). The "short-form" agreement renewed itself from year to year. In June, 1977, a new construction industry MLA was entered into between the ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., the SAN DIEGO BUILDING CONTRACTORS ASSOCIATION, and the ENGINEERING AND GENERAL CONTRACTORS ASSOCIATION ("Employer Associations") and various unions representing employees in the construction industry in San Diego County, including the BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL UNION NO. 36 ("Union"). At the time the 1977 MLA was entered into, owner-operators were considered by the NLRB to be "employees" within the meaning of the Act.[1] However, in 1978 the Board reversed itself as to the status of owner-operators,[2] and Section 42 of the MLA became an unlawful "hot cargo" provision.

In August, 1978, the Union sent ReCupido a letter demanding that owner-operators who were not members in good standing, including Petitioner, be removed from work. (G.C. Ex. No. 6, J.A. 27, 56.) In September, 1978, ReCupido informed seven owner-operators, including Petitioner, that they should join the Union if they wanted to continue working through Terra. Of the seven owner-operators, evidence in the record indicated that only Petitioner definitely joined the

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[1] *See Contractor Members of the Associated Gen. Contractors of Cal., Inc.*, 201 NLRB 311 (1973) supp. op. 209 NLRB 363 (1974) and supp. op. 209 NLRB 366 (1974).

[2] *See Associated Gen. Contractors of Cal.*, 220 NLRB 540, *enf. denied*, 564 F.2d 271 (9th Cir. 1977), *rev'd on remand*, 239 NLRB 686 (1978).

Union. The evidence also established that some of the seven owner-operators did not join the Union, though all continued working through Terra. (J.A. 56-58.)

C. National Labor Relations Board and Judicial Treatment of the Case.

In December, 1977, the CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION ("CDTOA"), filed the original charge in this matter contending that the Employer Associations and the Union violated Section 8(e) of the Act by agreeing to Section 42 of the MLA. In October, 1978, Petitioner filed a similar charge against the Union, alleging that the Union had violated Sections 8(b)(4) and 8(e) of the Act. At the request of the Regional Director, Petitioner filed a new charge containing only the Section 8(e) allegation.

On January 29, 1979, the Board consolidated the CDTOA's and Petitioner's charges and issued a complaint alleging that the Employer Associations and the Union had violated Section 8(e). The case was tried before an Administrative Law Judge ("ALJ") who found that the Employer Associations and the Union had violated Section 8(e). The ALJ's remedial order consisted of a cease and desist order, a requirement that the Employer Associations and Union post notices, and a requirement that the Employer Associations and the Union jointly and severally make whole owner-operators for their payments to the Union of dues, initiation fees, assessments and contributions to trust funds.

Upon exceptions to the ALJ's decision, the matter came before the Board. On May 8, 1980, the Board affirmed that certain provisions of the 1977-1980 MLA violated Section 8(e) of the Act. However, the Board noted that "[t]here is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion" by the Union and Employer Associations, and that reimbursement orders, such as the make-whole order recommended by the ALJ, are "gen-

erally overbroad and inappropriate in the context of 8(e) violations," and so declined to adopt the make-whole order. *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36,* 249 NLRB 386, 386 n.2 (1980). Additionally, the Board noted that the aggrieved owner-operators, as independent contractors, may pursue a damage claim under Section 303 of the Act. *Id.*

On December 4, 1981, the District of Columbia Circuit enforced the Board's order in all respects. The court held that in the absence of allegations and proof of coercion to enforce "hot cargo" agreements, the Board is not authorized to require the Union to refund dues and fees. *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36* v. *NLRB,* __ U.S. App. D.C. __, 669 F.2d 759, 766 (1981). The court noted that make-whole remedies are appropriate when employers or self-employed persons have been subjected to violations of Section 8(b)(4)(ii)(A) of the Act. *Id.* However, since a violation of Section 8(b)(4)(ii)(A) was not alleged, the court concluded that the Board's order was sufficient to effectuate the policies of the Act.

D. Relations Between the Employer Associations and the Union.

There is a substantial distinction between the Employer Associations and the Union in the present case. The unlawful "hot cargo" agreement was included in the 1977 MLA at the insistence of the Union and over the objection of the Employer Associations.

The Union's "insistence" upon the hot cargo language is relevant in light of prior actions by the Teamsters. Similar hot cargo language, applicable to owner-operators, has uniformly been demanded by the Teamsters in Southern California since 1965. In 1965, the Teamsters first proposed language regulating the use of owner-operators, which was rejected by the employers despite a 30-day strike. (J.A. 107-08.) A similar proposal was made in 1969, resulting in a 40-day strike and ultimately the inclusion of owner-operator provisions. (J.A.

108.) In 1970 and 1971, the Union made similar proposals. The 1970 proposals resulted in a brief strike, and the 1971 proposals resulted in a 30-day strike over the disputed owner-operator provisions. (J.A. 109-10.)[3]

At the time the MLA was entered into in 1977, owner-operators were considered by the NLRB to be "employees" within the meaning of the Act. Even so, the Employer Associations attempted to have Section 42 deleted during the 1977 MLA negotiations. (J.A. 104-06.) However, in reliance upon the existing Board law, and under the threat of economic action by the Union, the Employer Associations acquiesced to the Union's demand for inclusion of Section 42. (J.A. 106, 111-12.)

II

SUMMARY OF ARGUMENT

The Board's remedial order should be enforced because it is completely consistent with precedent, statutory language and structure, legislative intent, the policies of the Act, the issues raised by Petitioner in the complaint and the evidence in the record.

Petitioner alleged, and the Board held that the Union and Employer Associations violated Section 8(e). Neither the Board nor any court has ever held that a make-whole remedial

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[3] At the agency hearing, the parties stipulated as follows:

"The Teamsters initially proposed the inclusion of the owner-operator language in the May 1, 1965 Master Labor Agreement. The language was expanded at the Union's insistence in the 1972 Master Labor Agreement, and again in the 1974 Master Labor Agreement. The inclusion of the owner-operator language in each agreement was opposed by the employers, but was included at the Union's insistence, and as a result of economic pressure brought by the Unions against the employers." (J.A. 114.)

order is appropriate for an *employer* who has violated Section 8(e). Petitioner did not allege, and the Board did not find, any violation other than Section 8(e). Case law is clear that when there is a bare Section 8(e) violation, imposition of a make-whole remedial order upon either employer or Union violators is not suitable. Thus, the Board's remedial order is completely consistent with precedent.

The 1959 amendments to the NLRA created a statutory scheme directly applicable to the present case. Under prior law, unions could be held liable for damages in both an NLRB and a civil action for certain coercive "secondary" activity. However, voluntary agreements between unions and employers requiring employers to engage in secondary boycotts were not deemed illegal. The enactment of Section 8(e) in 1959 made all such hot cargo agreements between unions and employers unlawful, including voluntary agreements. Section 8(b)(4) was amended by adding that union coercion to enter into, or enforce, a hot cargo agreement is unlawful. The Act continued to provide for damages in two forums for union coercive secondary activity, though now union coercion to enforce hot cargo agreements could also be the basis for damages. The only remedies Congress provided for agreements which violate Section 8(e) are that said agreements are "unenforcible and void," and that Section 8(e) charges may be the basis for injunctive relief. 29 U.S.C. Section 160(l) (Section 10(l)). Congress did not extend monetary damages or a civil cause of action to individuals injured by a violation of Section 8(e). Thus, the Board has ruled in accordance with the statutory structure and legislative intent of Section 8(e).

The NLRA grants the Board broad discretion to fashion remedies for violations of the Act. The Board found that there was "insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion" by the Union and Employer Associations. There was no reversal of this finding of fact at the appellate level. The Board specifically stated that

make-whole orders are "generally overbroad and inappropriate in the context of 8(e) violations. . . . " Yet, the remedy requested in the present case, in light of the Board's findings of fact and conclusions of law, would deprive the Board of the very discretion the Act mandates.

Petitioner attempts to establish that it would be fundamentally unfair for him to be deprived of a make-whole remedy; that he would have a right without a remedy (something that Congress could not have intended when enacting Section 8(e)). However, Petitioner did not allege or prove that he was coerced in violation of Section 8(e), and that damages resulted. Therefore, the remedy provided was what Congress intended; agreements violative of Section 8(e) are "unenforcible and void." To the extent Petitioner is able to prove actual coercion, as he asserts, he failed to properly use existing law. Thus, Petitioner's own action deprives him of the right to a make-whole remedy in an action brought before the Board. If Petitioner can prove coercion, the Act *still* permits him to bring an action in federal district court and recover provable damages. 29 U.S.C. Section 187 (Section 303). A Section 303 civil action is only available against unions. Section 303 effectuates the congressional intent of holding unions, not employers, liable for damages resulting from coercive secondary activity. Congress recognized that unions, alone, benefit from secondary boycotts and that often, neutral employers, like the Employer Associations, became conduits for union secondary activities. That is why Congress expressly provided for damages against union coercion via Sections 8(b)(4) and 303, and expressly omitted damage recovery againt employers. Section 8(e) was enacted so that unions could not circumvent this statutory scheme. Until such time that Congress indicates an intention to alter the statutory scheme, Petitioner's requested remedy is inappropriate.

III

ARGUMENT

A. The Decisions Below Are Completely Consistent With Board and Reviewing Court Precedent.

1. *Make-Whole Has Never Been Applied in the Context of a Section 8(e) Violation, Standing Alone.*

In cases involving bare violations of Section 8(e), the Board and reviewing courts have never imposed make-whole remedies. In *Mishara Construction Co.* v. *International Brotherhood of Electrical Workers,* 554 F.2d 488, 491 (1st Cir. 1977), the court ruled that a party could not recover damages for an 8(e) violation, standing alone. In *Newspaper & Periodical Drivers & Helpers Union Local No. 921* v. *NLRB,* 509 F.2d 99, 100 (9th Cir. 1974) *cert. denied,* 423 U.S. 831 (1975), the court enforced a Board order holding that compensatory damages or backpay were not appropriate remedies for an employer and a union that violated Section 8(e).

Similarly, in *Marriott Corp.* v. *NLRB,* 491 F.2d 367, 371 (9th Cir. 1974), *cert. denied,* 419 U.S. 881 (1974), the court, in affirming that an agreement between an employer and a union violated Section 8(e), ruled that the Board did not abuse its discretion in not awarding compensatory damages.

In *General Longshore Workers Local No. 1418,* 235 NLRB 161 (1978), the charging party alleged violations of Sections 8(b)(4)(ii)(A) and (B), and 8(e). The Board held the union and employer associations in violation of Section 8(e), but found no violation of Section 8(b)(4)(ii)(A) and (B). The requested make-whole remedy was rejected. *See also NLRB* v. *Joint Council of Teamsters No. 38,* F.2d 23 (9th Cir. 1964); *International Longshoremen's Association Local 1410,* 235 NLRB 172 (1978); *Milk Wagon Drivers and Creamery Workers,* 181 NLRB 882 (1970).

Petitioner asserts that the relevant inquiry for a Section 8(e) remedy is damages resulting from *enforcement* of the agreement, and not whether there was *coercion.* (Petitioner's

Brief, pp. 20-21.) Respondent respectfully contends that there is no distinction: enforcement of the agreement is always due to union coercion. In fact, Petitioner asserts that the coercion in the present case was *a letter the Union sent to ReCupido.* (Petitioner's Brief, pp. 21-22, n. 13.)

Since a hot cargo agreement obligates an employer to undertake some secondary activity, the employer ultimately becomes the enforcer. Acknowledging this fact of life, Congress made unions liable for damages when they coerce employers to enter into or enforce hot cargo agreements, but did not provide for damages againt employers for enforcement of such agreements.

In keeping with this statutory scheme, the Board and reviewing courts have made no distinction between "coercion" and "enforcement." Rather, if union coercion is alleged and proven then damages may result, but if there is no coercion then there are no damages. *See, e.g., Mishara Construction Co.* v. *International Brotherhood of Electrical Workers, supra,* 554 F.2d at 491; *Marriott Corp.* v. *NLRB, supra,* 491 F.2d at 371; *General Longshore Workers, Local 1418, supra,* 235 NLRB 161.

Petitioner concedes that a considerable body of case law exists holding that coercion is required before the Board has authority to issue a make-whole remedy, yet attempts to distinguish those cases as involving violations of either Section 8(a)(1) or 8(b)(1)(A), the Act's provisions dealing with restraint or coercion by unions or employers. Petitioner concludes that since Section 8(e) is an independent unfair labor practice, not linked to Sections 8(a) or 8(b), the requirement of restraint or coercion, before make-whole is appropriate, is distinguishable in a Section 8(e) context. (Petitioner's Brief, p. 20.) However, this is a meaningless distinction. Board authority outside of the Sections 8(a)(1) and 8(b)(1) context, specifically within the Section 8(e) and 8(b)(4)(ii)(A) area, requires an element of coercion before make-whole orders are deemed appropriate. *See* discussion *supra* at 14-15. Moreover,

Section 8(e) is specifically linked to Section 8(b), as union coercion to enforce a Section 8(e) agreement is a violation of Section 8(b)(4)(ii)(A).

Neither Petitioner nor the CDTOA cite any decisions in which a Section 8(e) violation, standing alone, has resulted in a make-whole remedial order. Petitioner relies primarily upon *Joint Council of Teamsters, No. 42* v. *NLRB,* 671 F.2d 305 (9th Cir. 1981) and *Local 814, International Brotherhood of Teamsters (Santini Brothers, Inc.)* 208 NLRB 184 (1974), *remanded,* 512 F.2d 564 (D.C. Cir. 1975), *order affirmed,* 223 NLRB 752 (1976), *enforced,* 546 F.2d 989 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 818 (1977), to support his assertion that reimbursement orders are generally not overbroad in the context of a Section 8(e) violation. Interestingly, both of those cases involve allegations and proof of union violations of Section 8(b)(4)(ii)(A). Thus, the Board's remedial order, in the present case, is completely consistent with precedent.

2. *The Board's Remedial Order Is Appropriate With Respect to the Issues Raised by Petitioner in the Complaint.*

A major factor in this case is that Petitioner failed to allege a violation of Section 8(b)(4)(ii)(A). Petitioner seems to suggest that because he initially filed charges alleging violation of Section 8(b)(4) and Section 8(e), and subsequently agreed to withdraw the charges and replace them with charges alleging violation of Section 8(e), he should be entitled to a make-whole remedy pursuant to Section 8(b)(4). However, Petitioner was fully able to insist upon an investigation of Section 8(b)(4) charges, and his voluntary withdrawal of the Section 8(b)(4) charge leaves him with the remedies available pursuant to Section 8(e). The District of Columbia Circuit correctly stated: "[t]he petitioners suggest that the Board should have made a *sua sponte* finding of Section 8(b)(4)(ii)(A) violation; but since no such violation was charged, a *sua sponte* finding would have been improper." *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36* v. *NLRB,* 669 F.2d at 766-67.

3. *The Board's Remedial Order Is Appropriate With Respect to Evidence in the Record.*

Neither the Board nor the court below made specific findings that actual coercion occurred, or that any damages resulted from alleged coercion. The Board specifically held that: "[t]here is insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion. . . ." 249 NLRB at 386. The District of Columbia Circuit did not disturb the Board's factual conclusions, and held that in the absence of allegations and proof of coercion to enforce "hot cargo" agreements, the Board is not authorized to require the union to refund dues and fees. 669 F.2d at 766.

Petitioner asserts that the record contains undisputed evidence of actual coercion. Petitioner joined the Union because of the letter the Union sent to Terra, and that Petitioner joined and paid his dues under protest. (Petitioner's Brief, pp. 21-22, n. 13.) However, such evidence is insufficient, in light of the fact that other owner-operators received the same letter that Petitioner received, and evidence established that some of those owner-operators did not join the Union, though all continued working through Terra. Moreover, the record is void of evidence relating to actual damages resulting from the alleged Union coercion. (J.A. 56-58.)

Regardless, absent allegations of Section 8(b)(4)(ii)(A) violations, evidence of coercion and resulting damages is irrelevant.

4. *The Board's Remedial Order Is Consistent With Decisions Relating to Other Unfair Labor Practices.*

Outside of the Section 8(e) context, the Board and reviewing courts have consistently held that remedial orders requiring unions to refund dues and fees are inappropriate absent evidence that employees have been coerced.

The rationale is that individuals who become union signatories receive benefits from that association. Therefore, courts have required evidence of coercion to avoid punitive remedial orders and to avoid resulting unjust windfalls. Thus, the United States Supreme Court reversed a Board order requiring refund of dues and fees paid by employees pursuant to a union's maintenance and enforcement of an unlawful closed shop agreement. *Local 60, United Brotherhood of Carpenters* v. *NLRB,* 365 U.S. 651 (1961). The Court reasoned that since there was no evidence of coercion, a make-whole order would be "punitive and beyond the power of the Board." *Id.* at 654-56. *See also International Brotherhood of Electrical Workers* v. *Foust,* 442 U.S. 42, 52 (1979); *Mountaineer Shaft and Tunnel Construction Co.* v. *NLRB,* 624 F.2d 50, 51 (6th Cir. 1980); *Sheraton-Kauai Corp.* v. *NLRB,* 429 F.2d 1352, 1357 (9th Cir. 1970).

Therefore, Section 8(e) case law is consistent with the overriding statutory interpretation that coercion is a necessary element to justify make-whole remedies.

B. The Decisions Below Are in Accord With the Statutory Scheme of the 1959 Amendments to the National Labor Relations Act and the Legislative Intent of Section 8(e).

Congress first enacted prohibitions to union "secondary" activity in the 1947 amendments to the Act. 29 U.S.C. Section 141, *et seq.* (Labor-Management Relations [Taft-Hartley] Act.) Those provisions permitted injured parties to recover damages against unions pursuant to either a Section 8(b)(4) Board action, or a Section 303 federal district court civil action. The 1947 amendments made no mention of the availability of damages from employers for such unfair labor practices.

A subsequent U. S. Supreme Court decision revealed a "loophole" in the secondary boycott provisions. *Local 1976, United Brotherhood of Carpenters* v. *NLRB (Sand Door),* 357 U.S. 93 (1958). That decision held that voluntary "hot cargo"

agreements were not prohibited by the Act. Shortly thereafter, the 1959 amendments to the Act were passed by Congress, closing this loophole and expanding damage actions against unions. 29 U.S.C. Section 40, *et seq.* (Labor-Management Reporting and Disclosure [Landrum-Griffin] Act.)

1. ***The Statutory Scheme Provides Monetary Remedies for Parties Damaged by Union Secondary Activities, Including Coercion to Enforce Agreements Violative of Section 8(e).***

The 1959 amendments to the NLRA included the enactment of Section 8(e) and amendments to Sections 8(b)(4) and 303. Section 8(e) was enacted to close the loophole and make all hot cargo agreements unenforcible and void. Section 8(b)(4) was expanded by making it an unfair labor practice for a labor organization to coerce any person with an object of entering into or enforcing an agreement prohibited by Section 8(e). Section 303 was expanded to provide for damages against unions that violated Section 8(b)(4). These statutory provisions were part of a careful legislative structure designed to prevent *unions* from accomplishing unlawful secondary objectives.

a. *Section 8(e) Was Enacted to Close the Loophole in Existing Secondary Boycott Law and to Protect Employers From Union Pressure.*

Overwhelming legislative history surrounding the enactment of the 1959 amendments, as well as case authority, establish that Section 8(e) was enacted to close a loophole in the existing secondary boycott law. Archibald Cox, an advisor to Senator John F. Kennedy during the congressional consideration of the Landrum-Griffin amendments, termed the outlawing of hot cargo agreements as closing a "technical loophole in the Taft-Hartley Act." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257, 270 (1959).

Similarly, Senator Morse, a member of the Labor and Public Welfare Committee in 1959, stated that the Landrum-Griffin bill "was an effective and efficient instrument for closing the loopholes about which employers have rightly complained." 105 CONG. REC. 17,881 (1959), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1425 (1959).

In fact, a primary purpose in closing the loophole was to protect *employers* from union pressure and abuses, thereby strengthening the law prohibiting secondary boycotts. Congressman Thompson, a member of the Education and Labor Committee in 1959, explained the deficiencies in the existing laws. He noted that a secondary employer could easily be persuaded by the Teamsters to voluntarily enter into a hot cargo agreement because the cost of resistance would be quite high.[4]

Statements by Senator Kennedy,[5] Senator Morse,[6] and Mr. Cox[7] evidence that Section 8(e) was enacted to close the loophole and protect neutral employers from union persuasion.

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[4] Congressman Thompson stated:

"It is very hard for a trucking firm either to resist the Teamsters' demand for a hot cargo clause in collective bargaining, when the price of resistance would undoubtedly be a strike for still higher wages, or to refuse to live up to the contract . . . when the cost of noncompliance would undoubtedly be the Teamsters' insistence that the contract had been terminated by the violation, thus freeing the union to present new demands in collective bargaining." *Id.* at *16,590.*

[5] Senator John F. Kennedy, a leader in the passage of the ultimate bill, stated:

"I do not say that . . . any law . . . can eliminate Jimmy Hoffa. . . . But we can eliminate the evil practice by which he and his associates rose to power, . . . their reprisals against honest members, *their insistence on hot cargo clauses in trucking contracts* and their strong-arm picketing of plants where the union has already lost an election." 105 CONG. REC.

(Footnotes continued on following page)

This legislative history establishes that Section 8(e) was not enacted to prevent employers from aiding unions, but to prevent unions from pressuring employers.

United States Supreme Court authority leads to a similar conclusion. In *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 634-35 (1967), the Court held that the purpose of Section 8(e) is to protect "neutral employers" who were "conscripted" into union organizing campaigns. Congress enacted Section 8(e) to make hot cargo agreements *per se* unlawful so as to alleviate "situation(s) in which such clauses might be employed to exert subtle pressure upon employers. . . ." *Id. See also Kaiser Steel Corp.* v. *Mullins,* __ U.S. __, 102 S.Ct. 851 (1982).

(Footnotes continued from previous page)

7,022 (1959), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1259 (1959). (Emphasis added.)

[6] Senator Morse stated:

"In the 12 years since enactment of the Taft-Hartley Act the secondary boycott provision has become recognized as an extremely complex piece of legislation. The 12 years' experience suggested, to all who understood it, a need for revision, . . . on behalf of *employers who suffered from legislative loopholes* . . . ." 105 CONG. REC. 17,880 (1959), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1424 (1959). (Emphasis added.)

[7] Archibald Cox noted that there was an "impractical distinction" between induced cooperation of a secondary employer which was a violation under the existing law, while voluntary cooperation in the form of a hot-cargo agreement was legal. While such agreements technically were "voluntary," they were usually induced by the employer's fear that failure to cooperate would result in future unpleasant consequences. Cox stated:

"The only way of dealing with such pressure is to nip them in the bud by prohibiting the agreement . . . This was the theory upon which the Senate voted to outlaw 'hot-cargo' contracts in the trucking industry. In the House the prohibition was expanded to all agreements by which an employer agrees with a labor organization not to handle or use the goods of another person." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257, 272 (1959).

Thus, Section 8(e) was adopted to close a loophole in secondary boycott law as a means of controlling union abuses.

b. *Sections 8(b)(4) and 303 Were Amended to Extend Monetary Remedies to Parties Injured by Union Coercion to Enforce Agreements Violative of Section 8(e).*

At the same time Section 8(e) was enacted, Sections 8(b)(4) and 303 were amended. Those amendments extended monetary remedies to parties injured by union coercion to enter into or enforce agreements which violated Section 8(e).[8]

Thus, before and after the 1959 amendments, Congress specifically provided two avenues for monetary remedies for parties injured by illegal secondary activity. The amended Sections 8(b)(4) and 303 specifically entitled injured parties to damages resulting from coercion to enforce an agreement violative of Section 8(e). Both specifically apply only to unions, the instigators and benefactors of secondary activity.

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[8] Section 8(b)(4)(A) provides, in pertinent part:

"It shall be an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . . forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e). . . ." 29 U.S.C. Section 158(8)(4)(ii)(A). Section 303(a) provides, in pertinent part:

"It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4). . . ." 29 U.S.C. Section 187(a). Section 303(b) creates a civil action in United States district courts for injured parties to recover damages and the cost of the suit for Section 303(a) violations. 29 U.S.C. Section 187(b).

2. *Congress Did Not Intend That Monetary Damages Be Available for Violations of Section 8(e).*

a. *Congress Considered, and Rejected, Recovery of Damages for Violations of Section 8(e).*

The legislative history surrounding Section 8(e) establishes that it was not intended as a basis for damage recovery. Before, during, and following the adoption of the hot cargo amendment, there was discussion as to its enforcement. Although Congress considered the suggestion that Section 8(e) be subject to money damages, it specifically chose to make such agreements merely unenforcible and void. II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1916-17 (1959).

Senate Bill 1385, submitted by Senator McClellan, provided that "Whoever violates this section [8(e)] shall be fined not more than $5,000, or imprisoned not more than one year, or both." *Id.* at 1917. In introducing his bill, McClellan noted that in order "to insure that no hot-cargo clause shall be used as justification for, or in aid of, a secondary boycott, this bill outlaws hot-cargo clauses and provides a penalty against entering into them." 105 CONG. REC. 3,952 (1959), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1007 (1959). This bill was referred to the Committee on Labor and Public Welfare, but did not become part of the final law.

In addition, House of Representatives Bill 7265, submitted by Congressman Kearns, contained separate Section 8(a) and 8(b) provisions that made entry into hot cargo agreements unfair labor practices for both employers and unions. It applied to unions via proposed Section 8(b)(4)(iii) and to employers via proposed Section 8(a)(6). I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 595 (1959).

Section 8(e), as finally adopted, did *not* contain a damages provision.

b. *Congress Provided Specific Remedies for Violations of Section 8(e).*

Section 8(e) provides that agreements violative of its provision are unenforcible and void. The nullification of hot cargo agreements is the only remedy Congress deemed appropriate. In that way, unions would continue to be liable for injuries resulting from their coercive conduct, and secondary employers would be freed from union pressure.

Consistent with these intentions, Congress amended Section 10(l) to provide injunctive relief for violations of Section 8(e).[9]

Senator Smathers introduced the bill which contained the amendments to Section 10(l). He stated that the adopted provisions of Sections 8(e) and 10(l) contained effective enforcement safeguards against prohibited union hot cargo activity.[10]

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[9] Section 10(l) provides, *inter alia*, that a Section 8(e) charge may be the basis of a United States district court injunction or temporary restraining order. 29 U.S.C. Section 160(l).

[10] Senator Smathers stated:

"As a result of the McClellan hearings, all of us are acquainted with the abuses and threatened abuses of the Teamsters Union and the conduct of its president Jimmy Hoffa. We know only too well of his effort to obtain an economic stranglehold on our economy. His attempts to achieve this goal must be thwarted. Effective safeguards to enforce the prohibition of hot-cargo activity on the part of his union and any others engaged in such wrongful practices, is a great step forward in preventing any one individual or group of individuals from obtaining through the abusive exercise of power an economic stranglehold on our economy which would disastrously affect the public.

The amendment proposed by me and the distinguished and able senator from Louisiana [Mr. Long] provides enforceable safeguards and unmeasurably strengthens the unfair labor practices declared in the amendment of the able and distinguished senator from Tennessee [Mr. Gore]." 105 CONG. REC. 6,730 (1959), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1242 (1959).

3. *Application of the Statutory Scheme to the Present Case.*

Petitioner correctly states that " '[t]he starting point for interpreting a statute is the language of the statute itself. Absent clearly express legislative intent to the contrary, the language must ordinarily be regarded as conclusive.' " (Petitioner's Brief, p. 33, *quoting Consumer Products Safety Commission* v. *GTE Sylvania,* 447 U.S. 102, 108 (1980).)

The statute clearly provides that agreements in violation of Section 8(e) are unenforcible and void, and may be enjoined. The statute clearly provides that injured parties may recover damages against unions for coercive secondary activity, either through a Section 8(b)(4) Board action, or through a Section 303 civil action. Union coercion to enter into or enforce an agreement which violates Section 8(b)(4) is specifically actionable under Section 303.

Petitioner contends that "it is illogical to assume that Congress intended for an injured party to have a cause of action for damages against only one of the parties to the illegal hot cargo agreement that caused his damages [pursuant to Section 303]." (Petitioner's Brief, p. 38.) However, the clear statutory language belies Petitioner's assertion. Moreover, it is not only logical but documented that Congress intended damage recoveries only against unions for unlawful secondary activity. *See* discussion *supra* at nn. 4, 5, 6, 7 and 10.

Thus, Petitioner requests that this Court rule in a manner directly contrary to clear statutory language and legislative intent. Congress did not create Section 8(e) to be a means for monetary remedies. Sections 8(b)(4) and 303 are Congress' designated avenues for damage recovery.

C. The Decisions Below Effectuate the Policies of the Act.

Section 10(c) of the Act grants the Board broad discretion in devising remedies to effectuate the policies of the Act. *See NLRB* v. *J.H. Rutter-Rex Manufacturing Co.,* 396 U.S. 258

(1969); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). A Board order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

In the present case, the Board's remedial order is completely consistent with precedent, the statutory scheme, legislative intent, and the policies of the Act. Thus, the remedial order is neither an abuse of the Board's discretion nor a patent attempt to circumvent the policies of the Act and it should be left intact.

In attempting to effectuate the policies of the Act, courts stress "that the orders of the Board are required to be remedial and not punitive." *Florida Steel Corp.* v. *NLRB*, 587 F.2d 735, 746 (5th Cir. 1979); *see Local 777, Democratic Union Organizing Committee* v. *NLRB*, 603 F.2d 862, 890 (D.C. Cir. 1979); *NLRB* v. *Local Union No. 85, Sheet Metal Workers' International Association*, 274 F.2d 344, 346-47 (5th Cir. 1960).

A finding that there has been no proof of coercion, as reflected in the Board's remedial order, establishes that a reimbursement order would be punitive. In *NLRB* v. *Local Union No. 85, Sheet Metal Workers' International Association, supra*, the Court of Appeals reversed the Board's order that the union refund to employees initiation fees, dues and assessments, stating:

> "[i]n the absence of some proof that dues would not have been paid but for the requirement, the Board's reimbursement Order becomes punitive rather than compensatory. As a punitive measure, the refund provision of the Order should not be enforced." *Id.* at 347. *See also Local 60, United Brotherhood of Carpenters* v. *NLRB*, 365 U.S. 651, 655 (1961).

Furthermore, the Board's cease and desist order will dissipate the unwholesome effects of violations of the Act and act as a deterrent to subsequent violations. Besides the actual

impact of the cease and desist order, any further violation by either the Union or Employer Associations will be subject to contempt proceedings as well as other legal action.

In addition, the Board must balance the rights of all parties involved in exercising its broad remedial discretion under the Act. Shepard received some benefits from joining the Union (i.e., health and welfare benefits). On the other hand, the Employer Associations received no benefits from Shepard's payment of dues and fees. All such money went to the Union. To now require the employer to make Shepard whole would certainly be punitive as to the employer, and could possibly result in unjust windfalls to both Shepard and the Union. Thus, a make-whole remedy would constitute greater fundamental unfairness to the Employer Associations than the existing Board order places upon Petitioner. This is especially so in light of the fact that Petitioner had monetary remedies available had he made proper allegations which he would then be obligated to prove.

One of the policies of the Act which the Board attempts to effectuate, is "to restore the situation, as nearly as possible, to what would have obtained but for these violations." *Office & Professional Employees International Union, Local 425* v. *NLRB,* 136 U.S. App. D.C. 12, 419 F.2d 314, 322 (D.C. Cir. 1969). In *Winn-Dixie Stores* v. *NLRB,* 567 F.2d 1343, 1351 (5th Cir. 1978), the Court of Appeals reversed a Board order which attempted to restore the status quo:

> "[W]e think that the Board's remedy here is too speculative and that it is unduly burdensome on the employer. Even though the company violated the Act, there is no way to evaluate, or even to identify, the harm flowing to the employees as a result of that violation."

Since there was no allegation of an 8(b)(4)(ii)(A) violation, no proof of coercion on the part of the employer, and no evidence of actual damages suffered, the Board was correct in not attempting to restore a status quo which it could not perceive.

Lastly, requiring the Board to order make-whole in the context of a bare Section 8(e) violation, as Petitioner requests, is directly contrary to the policies of the Act. It is the Board that has been left with broad discretion to fashion remedies for violations of the Act. Yet, in a case such as the present, where the Board found that there was insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion, a ruling requiring the Board to order make-whole would, in essence, require the Board to order make-whole whenever a Section 8(e) violation is found. Hence, the Board would be left with no remedial discretion in Section 8(e) cases, and there would be no need to distinguish Section 8(b)(4)(ii)(A) violations from Section 8(e) violations.[11]

D. Imposition of a Make-Whole Remedy Upon the Employer Associations Would Be Inequitable, Against Precedent, and Contrary to the Purposes of the Act.

An employer has never been ordered to reimburse independent contractors or other businesses for violations of Section 8(e), even when tied to Section 8(b)(4) violations. *See, e.g., Local 814, International Brotherhood of Teamsters (Santini Brothers, Inc.)*, 208 NLRB 184, 201-202 (1974), *remanded* 512 F.2d 564 (D.C. Cir. 1975), *order affirmed*, 223 NLRB 752 (1976), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818 (1977); *Local Union No. 282 International Brotherhood of Teamsters*, 197 NLRB 673, 673-74 (1972); *Local Union No. 141 of the Sheet Metal Workers' International Association*, 174 NLRB 843, 843-44 (1969); *Local Union No. 98 of the Sheet Metal Workers' International Association*, 174 NLRB 104, 104-105 (1969) *enforced as modified*, 433 F.2d 1189 (D.C. Cir. 1970).[12]

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[11] Even if this Court determines that there are situations where make-whole remedies are valid for bare Section 8(e) violations, this is not an appropriate case because of the Board's undisturbed findings of fact.

[12] Neither Petitioner nor the CDTOA cite any cases where an employer has had a make-whole remedy imposed upon it for a violation of either Section 8(e) standing alone, or Section 8(e) in conjunction with a Section 8(b)(4) violation.

Petitioner places strong emphasis on *Santini Brothers, supra,* a case involving union violations of Sections 8(b)(4) and 8(e) and employer violation of Section 8(e). The employer, Santini, was in the business of moving household goods. 208 NLRB at 184. Santini contracted individually with a number of owner-operators who performed the service of loading, hauling and unloading the goods. The union and Santini entered into a contract requiring Santini to utilize only contractors who were members of the union. *Id.* at 200. The union notified Santini and its contractors that they must comply with the terms of the Agreement. Subsequently, the union warned Santini to comply with the Agreement, engaged in work stoppages, threatened further work stoppages to obtain compliance, "and demanded that Santini terminate the contracts of thirteen contractors who refused to join and pay dues to the Union. . . ." *Id.* Santini agreed to solicit and actually solicited union membership from its contractors, and refused to permit loading or unloading by contractors who would not join the union. As a result, some contractors joined the union in response to pressures, and others lost their work for failure to join the union. *Id.* The Board concluded that:

> "By entering into and giving effect to an agreement with the Union whereby Santini agreed to refrain from doing business with its independent contractors in contravention of Section 8(e) of the Act, *the Union and Santini* have engaged in unfair labor practices in violation of Section 8(e) of the Act." *Id.* at 201. (Emphasis added.)

However, the remedy ordered by the Board imposed no make-whole obligations upon Santini. *Id.* at 201-202.

Santini Brothers is similar to the present case in that the union(s) attempted to impose union membership upon independent contractor owner-operators by exerting pressure upon employer(s) who were parties to a collective bargaining agreement with the union(s). In both cases, the union(s) and the employer(s) entered into agreements which required the em-

ployer(s) to use only union owner-operators. In both cases, the union(s) and employer(s) were found to violate Section 8(e). *In both cases, the Board did not impose a make-whole remedial order upon the employer.* And, in both cases the owner-operators asserted they were coerced by the union(s). However, the owner-operators alleged a violation of Section 8(b)(4) and recovered damages from the union in *Santini Brothers,* while Petitioner did not.

In *Santini Brothers,* the Board found that the employer did coerce non-union owner-operators and enforced the agreement against those owner-operators. Yet, even under such circumstances, the Board did not require the employer to make-whole the owner-operators. Certainly, in the present case the Employer Associations should not be required to make whole owner-operators when there is neither an allegation of, nor evidence of, coercion on the part of the Employer Associations.

The Board has repeatedly recognized that it would be unjust to require reimbursement by an employer who is economically compelled by union strike pressure or other coercion to engage in proscribed activity.

In *J. Willis & Son Masonry,* 191 NLRB 872 (1971), the employer was absolved from joint and several liability in light of its involuntary participation in an unlawful discharge. The Board emphasized that the employer had not voluntarily discharged the employee but rather had resisted such action until it was threatened with a work stoppage by the union. *Id.* at 875.

The Board in *Bulletin Co.,* 181 NLRB 647 (1980), enforced, 443 F.2d 863 (3d Cir. 1971), modified the trial examiner's recommended remedy by releasing the employer from joint and several liability. The Board explained:

> "In light of the Union's intransigent attitude and the Company's vulnerability to union pressure, we cannot say, for remedy purposes herein, that the Company should be

> faulted for not having done more than it did to resist the Union's coercive and discriminatory conduct. Rather, we are satisfied that, under the circumstances presented, the Company took all reasonable measures required . . . and that the primary burden for restoring the wage losses resulting from the discrimination rightfully falls upon the Union." *Id.* at 647.

The Court of Appeals in *NLRB* v. *Lexington Electric Products Co.*, 283 F.2d 54, 58 (3d Cir. 1960), explained:

> "Imposing joint primary liability upon this employer will not encourage other employers to resist union demands, since in this case the employer did resist to the full extent that could reasonably be expected. Rather, imposing primary liability solely upon the union will tend to discourage such coercion. . . ."

The same principle has been applied by the Board in reimbursement cases involving union dues and assessments. The Board, in *Anton Notey,* 185 NLRB 147, 155 (1970), upheld the trial examiner's recommendation that the employer be excused from reimbursing employees for illegally deducted dues in light of the pressure created by the Union's sit-in activities.

In the present case, the Employer Associations reasonably resisted strong Union coercion prior to accepting the owner-operator language in question. As was previously discussed, inclusion of said language in the MLA was insisted upon by the Union in negotiations for the 1965, 1972, 1974 and 1977 agreements, and resulted in strike activity in 1965, 1970 and 1971. (J.A. 109-10, 114.) During the 1977 MLA negotiations, the Employer Associations proposed elimination of the owner-operator language (Section 42), even though such language was considered legal by the Board at that time. (J.A. 104-06.) *See supra* at p. 6, n. 1. Only after strike pressure was applied by

the Union, did the Employer Associations agree to include the Union's proposed Section 42. (J.A. 104-06.)[13]

In light of the history of Teamster strike activity in support of owner-operator language in Southern California, and the state of Board law when the 1977 MLA was entered into, it should be concluded that the Employer Associations exercised reasonable resistance to the owner-operator provisions. As such, any responsibility for reimbursement should be placed upon the Union and not the Employer Association.[14]

Payments for union dues were transmitted by the Employer Associations to the Union for its use. Owner-operators paid initiation fees and assessments directly to the Union. Since the Union was the recipient of funds designated for these purposes, and received the benefit of the funds, it is inappropriate and inequitable to require the Employer Associations to reimburse the owner-operators for such payments.

Precisely for that reason, the Ninth Circuit has denied the enforcement of a Board order requiring the reimbursement by

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[13] In fact, uncontroverted testimony established that this clause was a " 'blood item' with the Teamsters" which they insisted upon "to the point of a strike issue." (J.A. 110; 106.)

[14] Case law also establishes that an employer's good faith absolves it from joint and several liability. *See Intalco Aluminum Corp.* v. *NLRB*, 417 F.2d 36 (9th Cir. 1969); *Lenscraft Optical Corp.*, 128 NLRB 807 (1960). In ordering joint and several liability, the Board majority in *Hermet, Inc.*, 222 NLRB 29 (1976), wrote:

> "[W]e do not believe that these are 'appropriate circumstances' under which to impose only secondary liability on Hermet. The cases cited by our colleague are distinguishable since they involve situations where the employer who was held secondarily liable either strongly resisted the unions' unlawful demands or acted in 'good faith.' " *Id.* at 29.

At the time the parties entered into the MLA, Board law held that owner-operators were employees within the meaning of the Act. Thus, Section 42 of the MLA, at the time of its execution, was clearly not in violation of Section 8(e). Employer Associations' good faith reliance upon Board interpretation of the Act should not now support the imposition of a penalty upon the Employer Associations.

the employer of dues paid to the Union. The court held that the purposes of the Act would not be served by compelling the employer to pay twice, but rather the Union which received the dues should be obligated to reimburse the employees. *Kinney National Maintenance Services* v. *NLRB,* 69 L.C. ¶ 13,077 (9th Cir. 1972).

Not only would the Union be unjustly enriched at the expense of the Employer Associations, but the owner-operators would also receive a windfall at the expense of the Employer Associations. Under the provisions of the MLA, employers were required to make trust fund contributions on behalf of member owner-operators. (G.C. Ex. No. 9, MLA Section 45, J.A. 17.) Member owner-operators, including Petitioner, received fringe benefits, such as health and welfare benefits, vacation and holiday benefits, and pension benefits, from appropriate trusts. (G.C. Ex. No. 9, MLA Section 42, J.A. 13-15.)

In *Anton Notey,* 185 NLRB 147 (1970), the Board refused to order reimbursement of monies contributed to the Union's welfare trust fund since the employees, as a group, had enjoyed the benefits of the trust fund. The Board held that reimbursement in such a situation would amount to unjust enrichment. *Id.* at 147, n. 2. *See also Morrison-Knudsen Co.* v. *NLRB,* 275 F.2d 914 (2d Cir. 1960).

Lastly, the statutory scheme and legislative history establish that secondary boycotts and hot cargo agreements are initiated solely for the benefit of unions. *See* discussion, *supra* at nn. 4-7 and 10. As such, there is no justification for imposing make-whole liability on the Employer Associations. To the extent this Court determines that Petitioner is entitled to monetary recovery, the Act, case law, and equitable considerations mandate that the Union, alone, should be liable.

CONCLUSION

For the reasons set forth above, the Board properly denied issuing a make-whole remedy in the context of a bare Section 8(e) violation. Therefore, the decision of the Court of Appeals should be affirmed.

DATED: August 10, 1982

Respectfully submitted,

/s/

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Respondent's Reply Brief

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No. 81-1627

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LARRY SHEPARD,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, TEAMSTERS LOCAL 36; ASSOCIATED GENERAL CONTRACTORS OF AMERICA; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION; et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF OF RESPONDENT CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION

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ARGUMENT

I

INTRODUCTION

On unchallenged evidence, the NLRB found in this case that independent dump truck owner-operators were given an unlawful and impossible choice: to join the Teamsters Union, paying initiation fees, dues, and benefit plan contributions, or to forego their livelihood. It also found that owner-operators joined the Union as a result of that choice.

The question presented is whether, on the facts proven, the Board should have ordered the Union to disgorge the financial fruits of its unlawful activity, and to restore to the owner-operators what they were forced by the "hot cargo" agreement to give up.

The Board acknowledges that it can provide such relief, and could have

done so here./1 To justify its refusal to provide a make-whole remedy, the Board suggests that California Dump Truck Owners Association ("CDTOA") contends "that reimbursement is required in every case of a Section 8(e) violation." (NLRB Brief, at 31). CDTOA has never so contended. It does submit that there are cases when the Board's statutory mandate to "effectuate the policies" of the National Labor Relations Act requires a make-whole remedy, and that this is such a case. Without

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1. To avoid unnecessary repetition, CDTOA defers to petitioner and the Board in addressing the contention of the AFL-CIO, as amicus curiae, that the Board's power to order reimbursement of Union dues and fees extends only to employees. CDTOA merely notes that this proposition, even if it were correct, is logically useless here. The question is whether the Union should retain the money it extracted from owner-operators precisely by forcing them, wrongfully, to be treated as employees.

questioning the Board's considerable discretion in designing appropriate remedies, CDTOA respectfully suggests that in the circumstances of this case, the Board's remedial Order is plainly ineffective, that a reimbursement order is necessary here, and that the consistent remedial principles of federal labor policy so require.

II

THE BOARD'S ARGUMENT IS PREMISED UPON AN UNWARRANTED "SPECIAL" INTERPRETATION OF THE TERM "COERCION"

The NLRB argues in this Court that it was entitled to rely on "the absence of threats or coercion by the Union and Associations" in denying a

make-whole remedy./2 (NRLB Brief, at 37). Respondent Associated General Contractors echoes that contention. (AGC Brief, at 14.) CDTOA respectfully submits that the record before the Court unquestionably shows actual coercion, of the type the Board has consistently recognized and remedied.

In its Decision and Order in this case, the Board did not question

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2. In its Decision and Order, the Board stated that there was "insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by Respondents" (Cert. App., at 17a, n.2), not that actual coercion was lacking. It is true that only petitioner Shepard testified to the dollar amount of his coerced Union payments, but the fact of coercion is clear from the record, as discussed below. The amount of reimbursement to which owner-operators may be entitled is plainly an appropriate subject for Board compliance proceedings after remand.

its administrative law judge's finding on this issue: Under the pertinent labor agreement, as it was actually enforced, the independent

> "owner-operator has only two choices, i.e., he can become an employee [and a Union member] against his will and thereby subject himself to all the limitations of such status, or he can be precluded from hauling for signatory contractors, thereby effectively taking himself out of the hauling business." (Cert. App., at 37a)./3

Judge Stevens further found that the Union and the Associations attempted "to impose union membership on those owner-operators" (Cert. App., at 37a), and were successful in doing so:

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3. The administrative law judge's Decision and the NLRB's Decision and Order are printed in full as an appendix to the Petition for a Writ of Certiorari in this Court. CDTOA's citations thereto reference the pertinent page numbers within that appendix, in the following format: (Cert. App., at ___).

independent owner-operators (including petitioner) joined the Union and this "union membership of owner-operators resulted from illegal provisions of the [Master Labor Agreement] discussed herein." (Cert. App., at 41a).

Now that the Board and Associated General Contractors seem to question the fact of coercion, CDTOA returns to the undisputed evidence: On August 10, 1978, the Union wrote Terra Trucking, stating that seven owner-operators were "not members in good standing" of the Union, and demanding "that they be removed from your employ and not be rehired until properly

cleared by this Union." (J.A., at 27)./4 Terra Trucking's Fred ReCupido called a meeting of all seven owner-operators "plus the [other] individuals who I knew also were not members in the Teamsters Union." He showed them the letter, "told them that I had no choice except to do what the letter required," and "gave them a deadline of September 5 to join the Teamsters Union as required by this letter." Thereafter, all but "a couple" of the owner-operators joined the Union. (J.A., at 57-58).

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4. All this occurred after the Ninth Circuit Court of Appeals determined on a thorough, stipulated factual record that the owner-operators were independent contractors, who could not be treated as employees. Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (1977). From this point on, the Union's attempts to force membership on the owner-operators could not be and were not done in a naive belief that such conduct "was legal." (See Union Brief, at 24; NLRB Brief, at 31).

It is clear, in short, that owner-operators were forced by the threat of losing their livelihood to join the Union, to pay initiation fees and dues, and to make benefit plan contributions./5 On the basis of common

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5. Both the NLRB and the Union argue that Terra Trucking "apparently in general charged a higher rate on Union jobs to compensate for the added cost of the fringe benefit payments." (NLRB Brief, at 26; see also Union Brief, at 8, 25). They suggest that the owner-operators forced to contribute to Union benefit plans may have suffered no "net loss" as a result. This argument cannot save the Board's Order. First, the Board itself did not rely on it. Second, even if true, the proposition has no bearing on the reimbursement of Union initiation fees and dues. Third, the record does not support the assertion. In the testimony cited, Mr. ReCupido stated that "depending what time of the year it was, and what the situations were, there were occasions when there were differences in rates," and stated that such differentials "applied to some jobs, and others they did not." (J.A., at 79-80; emphasis supplied).

sense, confirmed by the Board's own established principles, those owner-operators who joined the Union as a result were indisputably coerced.

In its opening Brief to this Court, CDTOA cited numerous Board decisions ordering reimbursement for those who joined a union, after being presented with a union-security agreement offering exactly the choice the owner-operators were given here. (CDTOA Brief, at 34-46.) No attempt has been made to distinguish those cases, or their guiding principle that such a choice is inherently coercive. Significantly, the Board relies on Sheraton-Kauai Corporation v. NLRB, 429 F.2d 1352 (9th Cir. 1970), for the proposition that "reimbursement is not ordered unless coercion is established." In that case, however, the Ninth Circuit reviewed the Board's decisions and

concluded that its policy was to find coercion (and remedy it) from either direct evidence or

> "from the fact that the employees joined the Union after being informed that they were bound by a collective bargaining agreement containing a Union security clause which conditions continuation of employment upon Union membership." (429 F.2d at 1357-58; see also cases cited therein.)

The Court approved that policy, which applies with full force here.

Under these established principles, the Board could not reasonably decide that "the element of coercion" was in any way lacking on this record. The make-whole remedy requested would extend no further than to reimburse Union payments the owner-operators were actually coerced into making.

One final point requires emphasis. CDTOA and petitioner Larry

Shepard both seek the same make-whole remedy, for essentially the same reasons. Both agree that the facts presented show substantial actual coercion. (See Shepard Brief, at 21-22 n.13). Mr. Shepard, however, would take the argument further, contending at several points that coercion is not an element of a "hot cargo" violation, and "should not be a prerequisite to complete relief." (See Shepard Brief, at 19-21, 40). Whatever may be the merits of Mr. Shepard's broader argument, CDTOA submits that this case does not present that question. This Court need not decide whether a make-whole reimbursement order can be mandatory in the absence of coercion, because the undisputed facts and the unchallenged findings of the administrative law judge convincingly demonstrate precisely the

kind of actual coercion which it is the Board's established policy to remedy.

III

THE BOARD'S ORDER HERE CANNOT BE RECONCILED WITH THE CONSISTENT REMEDIAL POLICY OF FEDERAL LABOR LAW

In its opening Brief to this Court, CDTOA discussed at some length a plethora of NLRB decisions reflecting a consistent policy to order reimbursement for those who have been wrongfully induced to join or make payments to labor organizations. (CDTOA opening Brief, at 32-46.) As demonstrated there, this principle has been applied in a wide variety of contexts, and has received the consistent approval of the federal courts, including this one. Virginia Electric & Power Co. v.

National Labor Relations Board, 319 U.S. 533 (1943).

In response, the Board effectively concedes the general remedial principle, and addresses only the two prior "hot cargo" cases where it issued make-whole remedies. And the only thing the Board can say about those decisions is that both involved violations of Section 8(b)(4)(A) of the Act, as well as Section 8(e). The practical significance of the alleged distinction is simply stated: Where a union must coerce an employer to achieve the results forbidden by Section 8(e), it has violated Section 8(b)(4) as well. Where the union can obtain the unlawful result by demanding enforcement of a "hot cargo" clause and letting the signatory employer do the actual coercion, only Section 8(e) is violated.

The Board is essentially arguing that a make-whole remedy is appropriate only where the type of coercion specifically prohibited by Section 8(b)(4) occurs. With all respect, this position is not supported by the case law, and it makes no sense in terms of Congress' directive "to take such affirmative action . . . as will effectuate the policies" of the Act. Section 10(c) of the Act, 29 U.S.C. § 160(c).

Nothing in the decisions of this Court suggests or supports any such limitation on the Board's duty to give appropriate relief to coerced victims of unfair labor practices. The union payments ordered reimbursed in Virginia Electric & Power Co. were not coerced in any "special" way. Just as in this case, they were extracted by enforcement of a union security agreement. Likewise, Carpenters Local 60 v. NLRB,

365 U.S. 65 (1961), provides just one qualification to the consistent federal policy of reimbursement: The Board must avoid overbroad orders giving windfall rewards to persons whose union membership was not "influenced or compelled by reason of any unfair practice." 365 U.S. at 655. Because actual coercion was proven and found in this case, the remedial limit of Carpenters Local 60 has no bearing here.

Nor does the Board's new distinction comport with its own prior decisions, or those of the lower federal courts. For one thing, the enforcement of union security agreements is not itself unlawful. It acquires that character only if it occurs in the context of an unfair labor practice. But when the Board has found both factors it has repeatedly provided meaningful relief, without searching for any particular

type of actual coercion, and even where no element of coercion was necessary to find the unfair labor practice in the first place.

With all respect, adoption of the Board's new "rule" would substantially undermine the purposes for which Section 8(e) was enacted. A signatory employer faced with the demand the Union made here has only two choices; it can either resist, or comply. If it resists the demand, it risks union pressures with potentially substantial adverse effects. Even the Board apparently agrees that those injured by such union pressure, like the owner-operators here, could then obtain make-whole reimbursement for their injuries. But employers on whom a demand is made will seldom have any incentive to resist, and can avoid significant business risk by doing the Union's coercion for it. To limit a

meaningful remedy to situations where an employer elects masochism creates a virtually iron-clad device for circumventing Section 8(e).

The Board's decision here effectively tells labor organizations that demanding adherence to illegal "hot cargo" provisions will have no adverse consequences. All its Order required was that the Union and Associations cease enforcing specific offensive terms of a Master Labor Agreement which expired the very next month, in June 1980. Under the Board's decision, the worst consequence to be expected from continued wrongdoing will be another cease and desist order. Whatever funds the Union can illegally extract before it is issued will be left untouched. Given the Board's ruling in this case, and its articulated reasoning, what conceivable incentive can there be for the

Union and Associations to play by the rules of federal labor policy in the future?

IV

CONCLUSION

For the reasons set forth above, the Board's Order denying the requested make-whole reimbursement remedy cannot stand. The decision of the Court of Appeals enforcing the Board's Order should accordingly be reversed, and the case remanded to the Board for further proceedings.

DATED: November 22, 1982.

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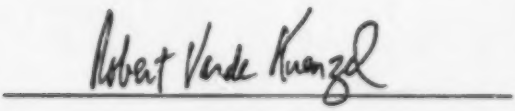
By 

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Amicus Brief

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No. 81-1627

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

LARRY SHEPARD,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

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OCTOBER TERM, 1981

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LARRY SHEPARD,

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NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in the instant case.

Petitioner, "a small independent businessman" (Brief for the Petitioner, p. 4), made payments to a union in the form of initiation fees, dues, and fringe benefits payments, pursuant to an agreement between the union and certain employers providing for those payments. In this

case the National Labor Relations Board concluded that the underlying agreement violated § 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(e). Petitioner contends that the Board abused its discretion by not assessing the union the amounts petitioner paid as a remedy for that § 8(e) violation.

But there is a threshold question in this case that has largely been ignored by the parties: whether the Board has *statutory authority* to assess monetary remedies against unions and in favor of businesses for violations of § 8(e). The thesis of the AFL-CIO's attached brief *amicus curiae* is that the Board does *not* possess such statutory authority. In addressing that issue, we focus in particular on the legislative materials showing Congress' intent with respect to remedies for violations of § 8(e)—materials which, it appears, will not be fully dealt with in the briefs of the parties.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

SUMMARY OF ARGUMENT

The implicit *assumption* of petitioner's brief is that the National Labor Relations Board as a general matter possesses statutory authority to award monetary relief against unions for violations of § 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(e). Proceeding from that assumption, petitioner contends that the Board's decision not to award such relief in this case constitutes an abuse of the Board's discretion. Our submission is that petitioner's position fails at the threshold:

contrary to petitioner's assumption, Congress has *not* authorized the Board to award monetary relief against unions and in favor of businesses for violations of § 8(e), and the Board is consequently without power to provide the remedy petitioner seeks. The decision below denying such relief is, therefore, correct and should be affirmed.

1. The remedial authority of the Board, as it applies to this case, is set forth in § 10(c) of the Act. As this Court has made clear, in § 10(c) "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Automobile Workers v. Russell*, 356 U.S. 634, 643. Except in certain instances, such as where an employee seeks the backpay remedy that is expressly authorized by § 10(c), or a remedy akin thereto (*Virginia Electric Power Co. v. Labor Board*, 319 U.S. 533), the authority of the Board to provide a monetary remedy for an unfair labor practice may not simply be assumed but rather must be demonstrated. Pp. 4-5 *infra*.

2. No such demonstration is possible here. For the legislative materials make it clear that Congress did not authorize the Board to enter orders requiring unions to make businesses whole for losses caused by violations of § 8(e).

a) The legislative history of the 1947 NLRA amendments—which created the first union unfair labor practices—establishes two propositions of critical importance here. First, the understanding of the 1947 Congress was that in the absence of an express authorization, the Board would not have the power to award monetary remedies to businesses for losses caused by union unfair labor practices, including the secondary boycotts and jurisdictional strikes that were made unlawful by § 8(b)(4) of the statute. Second, rather than expand the Board's remedial authority to encompass such monetary awards, the 1947 Congress chose to enact § 303, providing a damages remedy in federal court for violations of § 8(b)(4), because

"[no] one [in Congress] felt that that particular function should be in the Board." 2 Leg. Hist. (1947) at 1371 (Sen. Taft). Pp. 6-8 *infra*.

b) Decisions of this Court and of the Board between 1947 and 1959 confirmed Congress' understanding that businesses could not obtain monetary remedies for secondary boycotts and other union unfair labor practices in Board proceedings, and that such remedies were available only to the extent that Congress authorized the *courts* to award damages in suits under § 303. Pp. 8-12 *infra*.

c) In 1959, when Congress enacted § 8(e), the legislature did not alter the remedial authority of the Board as set forth in § 10(c). The legislative history of the 1959 amendments establishes that in enacting those amendments the intent of Congress was, as it had been in 1947, not to authorize the Board to award monetary remedies to businesses injured by union secondary activity such as that proscribed by § 8(e). Pp. 12-16 *infra*.

Thus, the monetary remedy sought by petitioner is beyond the Board's statutory authority and the decision below denying that remedy is correct.

3. It is no answer to contend, as petitioner does, that this case is analogous to *Virginia Electric Power Co. v. Labor Board*, *supra*, in which the Court upheld the Board's power to require an employer to reimburse employees the amount of dues checked-off from the employees' wages and paid as a condition of employment to a company-dominated union. *Virginia Electric Power* involved a remedy to *employees* which the Court found, in the circumstances of that case, to be "not unlike" the backpay that § 10(c) expressly authorizes the Board to award to employees for certain violations. 319 U.S. at 541. This case, in contrast, concerns a businessman that seeks to recover losses attributable to a violation of § 8(e); and the legislative history discussed above makes clear that Congress did not empower the Board to provide a monetary remedy for such losses. Pp. 16-18 *infra*.

ARGUMENT

The implicit *assumption* of petitioner's brief is that the to monetary relief against unions for violations of § 8(e) of the NLRA, as amended, 29 U.S.C. § 158(e). Proceeding from that assumption, petitioner contends that the Board's decision not to award such relief in this case constitutes an abuse of the Board's discretion. Our submission is that petitioner's position fails at the threshold: contrary to petitioner's assumption, Congress has *not* authorized the Board to award monetary relief against unions and in favor of businesses for violations of § 8(e), and the Board is consequently without power to provide the remedy petitioner seeks. The decision below denying such relief is, therefore, correct and should be affirmed.

1. The remedial authority of the Board, as it applies to this case, is set forth in § 10(c) of the Act, 29 U.S.C. § 160(c). That provision states in pertinent part that where the Board finds that any person has committed an unfair labor practice

> the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . .

As this Court has made clear, in § 10(c) "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Automobile Workers v. Russell*, 356 U.S. 634, 643; *United Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665. To be sure, § 10(c) allows for monetary awards in certain instances;

for example, § 10(c) expressly authorizes an award of backpay to an employee who has been the victim of proscribed discrimination, and this Court has determined that § 10(c) authorizes as well certain other monetary remedies to employees that are akin to backpay awards. *Virginia Electric Power Co. v. Labor Board*, 319 U.S. 533. There may also be other instances in which the Board has authority to fashion some form of monetary remedy for a violation of the Act. But given that § 10(c) is silent with respect to monetary remedies other than backpay, and that Congress did not intend to "establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct" (*Russell*, 356 U.S. at 643), the authority of the Board to provide a monetary remedy in any particular type of case may not simply be assumed but rather must be demonstrated.

No such demonstration is possible here. For the legislative materials make it clear that Congress did not authorize the Board to enter monetary awards against unions and in favor of businesses for violations of § 8(e).

2. Petitioner correctly notes that Congress, in enacting § 8(e), did not amend § 303 of the Act, 29 U.S.C. § 187, which provides a judicial cause of action for damages for violations of § 8(b)(4) (29 U.S.C. § 158(b)(4), to cover violations of § 8(e). Brief for the Petitioner, pp. 29-37. But petitioner draws the wrong lesson from that fact. In petitioner's view, Congress' decision not to provide an action under § 303 must mean that Congress intended that persons aggrieved by § 8(e) violations could secure monetary relief from the NLRB. In fact, however, as is evident from a retracing of the legislative history both of the 1947 NLRA amendments (which created the first union unfair labor practices) and of the 1959 NLRA amendments (which created § 8(e)), Congress' determination not to provide a judicial action for § 8(e) violations reflected a judgment that such violations should be redressed by the Board's mandatory injunctive procedure and not by damage awards.

a) The understanding of the 1947 Congress was that, absent an express authorization, monetary awards would not be available to businesses injured by union unfair labor practices, including the secondary boycotts and other activities made unlawful by § 8(b)(4). Section 303 was added on the floor of the Senate to provide a means by which unions could be held monetarily responsible to businesses for unlawful secondary boycotts and jurisdictional strikes; Senator Taft explained (i) that in the absence of § 303's adoption unions would have no damage liability at all, and (ii) that § 303 embodied a judgment on the part of its proponents that monetary remedies for violations of § 8(b)(4) should be available only through the *courts*, not through the Board.

The bill amending the Wagner Act reported by the Senate Labor Committee included the prohibitions against secondary boycotts and other activities that emerged as § 8(b)(4), the provision requiring the NLRB to seek injunctions against such activities that emerged as § 10(l), and the general definition of NLRB remedial authority that emerged as § 10(c). Senator Taft argued that the bill in that form was deficient, particularly because "without the right to sue for damages, there is no recourse for a man who is injured by a secondary boycott" (2 Leg. Hist. (1947) at 1365).[1] Senator Taft was emphatic that § 303 was a necessary addition without which there would be no damage remedy:

> I think it [§ 303] is a most effective remedy. Under the bill there is a kind of injunctive remedy through the National Labor Relations Board, but there is no possibility of a suit for damages . . . I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore

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[1] Citations to the 1947 legislative history ("Leg. Hist.") are to National Labor Relations Board, *Legislative History of the Labor Management Relations Act, 1947* (G.P.O., 1948).

> to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost. [2 Leg. Hist. (1947) at 1371.]

Senator Taft went on to explain that his proposal placed the power to award monetary relief in the courts, and not in the NLRB, because he understood there to be a consensus that assessing such relief should not be within the Board's powers:

> We considered making it a procedure through the National Labor Relations Board also, but it was not felt I think by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. *I do not think anyone felt that that particular function should be in the Board. So, if a remedy is to be provided at all, if there is to be any recourse for financial losses caused by unions, it must be by direct suit, as proposed by the amendment.* [2 Leg. Hist. (1947) at 1371; emphasis added.]

The proposal to add § 303 to the bill was controversial, opponents fearing that making available damage awards might render unions destitute. Senator Morse, for example, warned that employers might "litigate a union right out of existence if it makes a mistake" and declared a damage remedy "too harsh" (*id.* at 1398). The debate was heated but all speakers, on both sides of the issue, understood (as Senator Taft had declared in the passage quoted above) that § 10(c) did not empower the NLRB to award monetary remedies to businessmen and other non-employees for union unfair labor practices and thus that the existence of such remedies "at all" depended on the fate of Senator Taft's proposed amendment.[2] And, of course, the result of that debate and of the conference

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[2] See, *e.g.*, 2 Leg. Hist. (1947) at 1357 (Senator Ives) ("I know of no reason in the word why one suffering from such abuses or violations should not have the right to recover damages . . . in . . . court"); *id.* at 1358 (Senator Morse) (objects to "dispersion of authority," with "[t]he Board . . . conducting a hearing looking to

with the House of Representatives was the enactment of a § 303 damage remedy in court for unlawful secondary activity.

b) Between passage of the Taft-Hartley Act in 1947 and the adoption of § 8(e) in 1959, both this Court and the NLRB had occasion to reconfirm the understanding of the 1947 Congress that § 10(c) does not empower the Board to award damages to businesses and thus that monetary remedies for unlawful secondary boycotts exist "at all" only by reason of § 303.

In *Longshoremen v. Juneau Spruce Corp.*, 342 U.S. 237, the issue was whether an employer could recover damages in a § 303 action in the absence of a determination by the NLRB that the union's conduct violated § 8(b)(4). The Court held that such an award is proper, because the two provisions, although condemning the same conduct, "specify two different remedies" that are "independent of each other" (*id.* at 244). Section 8(b)(4) "gives rise to an administrative finding" that "can be the basis for a cease and desist order under § 10(b) and (c)" (*id.* at 243 & n.10). Section 303 gives rise "to a judgment for damages" (*id.* at 243-244).

In *United Workers v. Laburnum Corp.*, 347 U.S. 656, the issue was whether a union that committed violations

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a cease-and-desist order" and "a . . . federal court . . . deciding whether a damage action lies"); *id.* at 1361 (Senator Morse) (objects to the "manifest injustice" of providing damage remedies—"additional penalties"—for union unfair labor practices but not for employer unfair labor practices); *id.* at 1368 (Sen. Murray) (some objection as to "gross inequality"); *id.* at 1373 (Sen. Baldwin (§ 303 "would create a civil liability for damages"); *id.* at 1373 (Sen. Hatch) (§ 303 would "make the person liable in civil damages"); *id.* at 1483 (Sen. Hatch) ("I agree that unions should be held responsible for damages resulting from ill-considered activities," it being the purpose of § 303 to establish such responsibility); *id.* at 1570 (Senator Murray) (because of § 303 "unions are . . . liable for damages as well as being guilty of unfair labor practices in such cases").

of § 8(b)(1)(A)—violently interfering with employees' access to the workplace, with consequent loss of production by the employer—could be required by a state court to pay damages to the employer in a tort action. The Court held that such an award is proper and that state court authority in this regard is not preempted by the exclusive jurisdiction of the NLRB. *Garner v. Teamsters Union*, 346 U.S. 485, which holds that the Board's cease-and-desist authority does preempt state court injunctions against unfair labor practices was distinguished on the ground that Congress had not given the Board the power to award *damages* for union unfair labor practices:

> Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct.
>
> * * *
>
> The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay [citing § 10(c)]. [*Laburnum*, 347 U.S. at 663-665.][a]

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[a] We cite *Laburnum* solely for its statement of the scope of the Board's remedial authority. The rationale for *Laburnum's* result and for that decision's distinction of *Garner* was restated in *San Diego Unions v. Garmon*, 359 U.S. 236, this Court's definitive statement of the primary jurisdiction branch of the labor law preemption doctrine:

> It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers v. Russell*, 356 U.S. 634; *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656. We have also allowed the States to enjoin such conduct. *Youngdahl v. Rainfair*, 355 U.S. 131; *Auto Workers v. Wisconsin Board*, 351 U.S. 266. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congres-

The Court went on to note "[o]ne instance" in which the Act "expressly authorizes a recovery of damages," *viz.*, § 303 (*id.* at 665).

Upon similar reasoning, in 1948, the NLRB had concluded that § 10(c) does not authorize the award of monetary relief to employers for strikes violative of §§ 8(b)(2) & (3). *National Maritime Union of America*, 78 NLRB 971. The case involved unions whose strike was found to be violative of both of those provisions—because in support of a nonmandatory bargaining demand that, if agreed to, would have discriminated against non-union employees (*id.* at 973-982). As a remedy, the employers requested that "the Board assess the Respondents with such monetary damages as these [employers] may have suffered as a result of the strike authorized by the Respondents" (*id.* at 988). In concluding that § 10(c) does not authorize that remedy, the Board reasoned as follows:

> The Companies maintain that the assessment of damages against unions which strike for the purpose of compelling employers to discriminate unlawfully against employees will "effectuate the policies of this Act," in that it will encourage employers to resist such union demands if they are made whole for the economic consequences of a strike. Even if we assume that assessing money damages against unions that have caused a strike in violation of Section 8(b)(2) would have the result claimed for it by the Companies, to do so would involve our assuming a power which is appropriately a function of the courts, rather than of administrative tribunals. We would take such a step only if we believed that it was clearly the intention of the Congress that

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sional direction. We recognize that the opinion in *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the "type of conduct" involved, *i.e.*, "intimidation and threats of violence." In the present case there is no such compelling state interest. [359 U.S. 247-248.]

we do so. We find no such mandate in the amended Act; to the contrary we find, in the structure of the Act, and in its legislative history, a clear prohibition against our granting the remedy which the Companies here seek.

With the exception of the provision entitling the Board to require a labor organization to pay back pay where it has been responsible for unlawful discrimination against employees, Section 10(c), insofar as is here relevant, is a reenactment of the identical provision in the Wagner Act. In exercising the power which Section 10(c) of the Wagner Act conferred, the Board has, of course, ordered the payment of monies; but in each case such order was based on either the specific language of Section 10(c) (e.g., a back pay order), or the fact that the order was a necessary concomitant of the remedies which Section 10(c), in its specific language or legislative history, provided for (e.g., an order directing the employer to reimburse employees for dues which he had "checked off" in behalf of a company-dominated union).

The Act as now amended contains provisions which are designed for the protection of employers as well as employees. It is thus particularly significant that in amending the Act Congress did not change Section 10(c) except in the one respect noted above. Other sections were added to the Act to provide employers with special remedies not encompassed by Section 10(c) in cases of union unfair labor practices. Thus Section 10(l) requires the Board to obtain an injunction against a union's violation of Section 8(b)(4)(A), (B), or (C), if it has cause to believe that a charge of such violation is true. In addition, Congress provided in Section 303 of the amended Act for suits in the Federal district courts for damages resulting from certain acts of unions or their representatives, which are also made unfair labor practices in Section 8(b)(4). Congress thus considered the issue of money damages resulting from strikes which are union unfair labor prac-

> tices. It confined the right to obtain money damages to cases involving specific kinds of strikes, and made the Federal district courts available for such suits.
>
> That Congress did not intend thereby to vest in the Board a similar power to assess unions with money damages resulting from strikes is most clearly indicated in the legislative history of Section 303 [quoting the statements of Senator Taft reprinted *supra*, at 6-7.] [*id.* at 989-990; footnotes omitted].

We have been unable to find even one litigated case between 1947 and 1959 in which the Board ever awarded monetary relief to a business for a union unfair labor practice.[4]

c) Thus, in 1959, as Congress considered amendments to the Act, decisions of this Court and of the Board had confirmed the understanding expressed by Congress in 1947 that § 10(c) does not authorize the Board to award damages to businesses for union unfair labor practices. And, with respect to the specific subject of unlawful secondary activity, the Court had recognized in *Juneau Spruce* what is clear from the 1947 legislative history, *viz.*, that Congress in enacting § 303 chose to empower only the *courts* to provide monetary relief for unlawful secondary activity.

Congress, in 1959, amended § 8(b)(4) in certain respects, and also enacted two sections creating new union unfair labor practices: § 8(e), which like § 8(b)(4) addresses the secondary boycott question, and § 8(b)(7) which deals with organizational and recognitional picketing. No change was made in § 10(c)—the provision defining the NLRB's remedial power. Section 303 was

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[4] In one case predating *National Maritime Union*, the Board approved a settlement agreement—entered into without litigation—in which a union agreed to reimburse an employer monies that allegedly had been exacted from the employer in violation of § 8(b)(6)—the "featherbedding" provision of the Act. *Cement Finishers Local No. 627*, 22 LRRM 1289 (1948).

amended to conform that provision to the changes made in § 8(b)(4) (see II L.H. (1959) at 1859 (Sen. Goldwater)),[5] but § 303 was *not* amended to create damage actions for the conduct newly condemned in §§ 8(e) & 8(b)(7).

It appears that no proposal to expand § 303 to include § 8(e) violations was put forward. But such proposals *were* made with respect to § 8(b)(7), and the circumstances of their rejection demonstrate both (i) that Congress knew that businesses could not secure monetary remedies for union unfair labor practices absent express statutory authorization, and (ii) that Congress was not disposed to expand the availability of such remedies beyond § 8(b)(4) violations.

The bill passed by the Senate contained a § 8(b)(7) banning certain types of organizational picketing (I L.H. at 683-584), but no corresponding change in § 303. The bill passed by the House differed substantially from the Senate bill in the scope of the substantive prohibitions contained in its § 8(b)(7), and in addition the House bill amended § 303 to provide damage actions for violations of § 8(b)(7)) (II L.H. at 1700). In conference, the difference between the bodies as to the substantive content of § 8(b)(7) were compromised (H.R. Rep. No. 1147, pp. 40-41; I L.H. at 944-945), and violations of § 8(b)(7) were removed from the ambit of § 303.

Senator Goldwater had planted the seed for that removal in a comparison of the Senate and House bills that he made prior to conference. Noting that the House bill "open[ed] up unions to damage suits for [organizational and recognitional] picketing, no matter how peaceful" (II L.H. at 1361), Senator Goldwater declared:

> Making peaceful picketing subject to actions for damages in Federal as well as State courts is a

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[5] Citations to the 1959 legislative history ("L.H.") are to National Labor Relations Board, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* (G.P.O., 1959).

> serious departure from present labor policy . . . The result of this departure from existing labor policy could well be upsetting to the balance between the rights of employees and unions and the rights of employers. [II L.H. at 1361.)

Reporting the results of the conference to the Senate, Senator Kennedy declared the House's inclusion of § 8(b)(7) violations under § 303 as "the most serious shortcoming" in the House bill (*id.* at 1389), and explained:

> We eliminated a section of the Landrum-Griffin bill which would have permitted damage suits against unions which might have picketed for organizational purposes. *We have provided regular remedies.* [II L.H. at 1389; emphasis added.]

Other Senators and Representatives likewise hailed the removal of § 8(b)(7) violations from § 303 as among "the most important improvements made by the conferees" (*id.* at 1720 (Rep. Thompson); 1810 (Rep. McDonald); 1820-21 (Rep. Pucinski) ("it was these changes which made the conference report acceptable to many members of this House who originally voted against the . . . bill"); 1834 (Sen. Douglas)).

Any thought that the failure to include § 8(e) violations in § 303 might have been an oversight—rather than a considered judgment that such violations do not merit the exceptional treatment accorded § 8(b)(4) violations—is entirely dispelled when the 1959 Congress' treatment of secondary activity is looked at as a whole. As the Court stated just last term

> Prior to 1959, there were gaps in the existing protections against secondary boycotts. In *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)*, 357 U.S. 93 (1958), this Court held that a union could not engage in strikes or other concerted activity to enforce "hot cargo" agreements—agreements that required employers to boycott the goods or services of another party with whom the union

had a dispute. However, *Sand Door* indicated that employers and unions were free to enter into hot cargo agreements, and that compliance was lawful so long as it was voluntary. *Id.*, at 108.

Section 8(e), which prohibits hot cargo agreements, was designed to eliminate the loophole created by the *Sand Door* decision. See *Connell Construction Co., supra*, at 628. See also *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 634 (1967). [*Woelke & Romero Framing, Inc. v. NLRB*, —— U.S. ——, 50 L.W. 4538, 4540 (May 24, 1982).]

Thus, the 1959 Congress was well aware that § 8(e) was one of a complex of provisions—§§ 8(b)(4), 8(e), 10(c) & (l) & 303—directed at defining unlawful secondary boycotts and delineating the remedies for such activity so defined. As we have shown, the 1947 Congress, having determined to outlaw secondary boycotts, provided *two* special enforcement mechanisms respecting § 8(b)(4) violations not available in the case of other unfair labor practices: mandatory NLRB injunction actions (§ 10(l)) and private damage actions (§ 303). The 1959 Congress amended § 10(l) to provide mandatory NLRB injunction actions for both § 8(b)(7) & § 8(e) violations (I L.H. at 583-584, II L.H. at 1700). That Congress also expanded § 8(b)(4) to cover the unlawful use of force to secure an agreement prohibited by § 8(e) and made the necessary parallel changes in § 303. But the private damage action provision was *not* expanded to cover damages stemming from a simple § 8(e) violation.

Thus, Congress' judgment was to make the special mandatory injunction provision applicable to both § 8(b)(7) & § 8(e) violations, but the damage action provision applicable to *neither*. These judgments all were embodied in a single section (§ 704) of the enactment passed by Congress: § 704(b) created § 8(e); § 704(c) created § 8(b)(7); § 704(d) amended § 10(l) by adding §§ 8(e) and 8(b)(7); and § 704(e) amended § 303 but left that provision applicable solely to § 8(b)(4) violations (I

L.H. at 25-27). Senator Goldwater's distress, quoted in text *supra* at 13-14, at the prospect of damage liability for "peaceful picketing" explains why Congress cut the line on the availability of damages so as to exclude losses attributable to simple § 8(e) violations.

d) In sum what Congress did in 1947 and 1959 and the expressed basis for its decisions show that the legislature consciously withheld from the Board the power to prescribe monetary remedies against unions for violations of § 8(e). When Congress first determined in 1947 that certain union secondary activity would be condemned in § 8(b)(4) as an unfair labor practice, Congress understood that the Board would not have the power under § 10(c) to provide a monetary remedy for such activity unless Congress expressly authorized that remedy. And, Congress, believing the Board to be unsuited to providing monetary remedies for violations of § 8(b)(4), chose to enact § 303 rather than to expand the Board's remedial authority. When Congress, in 1959, amended the prohibitions on secondary activity by enacting § 8(e) the legislature left the Board's remedial authority unchanged, again with the understanding that the Board would be without power to provide monetary remedies to businesses injured by such unfair labor practices.

3. What has been shown to this point is more than sufficient, we believe, to demonstrate both that the decision below denying petitioner a monetary remedy for the § 8(e) violation found here is correct and that the scattering of post-1959 NLRB decisions providing a monetary remedy for unlawful secondary activity (cited in petitioner's brief at pp. 24-25) are wrong because in excess of the Board's statutory authority. A word more is warranted on petitioner's reliance on decisions that have sustained the Board's authority to order a rebate of dues *to employees* in the case of certain types of violations other than violations of § 8(e). *Virginia Electric Power Co. v. Labor Board*, 319 U.S. 533; *Carpenters Local v. Labor Board*, 365 U.S. 651, 655-656 (dictum).

Virginia Electric Power upholds the Board's power to require an employer to reimburse employees the amount of dues checked-off from the employees' wages and paid as a condition of employment to a company-dominated union, on the ground that such a reimbursement remedy is in those circumstances the practical equivalent of the backpay award to employees specifically authorized in § 10(c).

> The deduction of dues from wages under the circumstances of this case is not unlike a loss occasioned by a discriminatory discharge, and an order for the return of those checked-off dues promotes the policies of the Act in substantially the same manner as would a back pay award. [319 U.S. at 541].

In *Virginia Electric Power*, employees were confronted with the choice of paying dues to the company-dominated union or of not doing so and being fired. An employee who opted for the latter course would suffer the loss of his pay and be eligible for the backpay that is expressly provided in § 10(c). The Court reasoned that an employee who opted for the former, and thus suffered an injury in the form of a diminution of his pay rather than a complete loss did not fall outside the remedial scope of § 10(c).

This case, in contrast to *Virginia Electric Power*, does not involve employees who seek to recover backpay or its practical equivalent. Petitioner is a business enterprise who seeks to recover money allegedly lost as a result of demands imposed by a § 8(e) agreement between a union and other businesses. Petitioner is therefore in no different a position than any other business that suffers what Congress recognized as one of the frequent consequences of a § 8(e) agreement—accession to union demands in order to retain business with the signatories to the agreement. *See Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 636-637. And, if petitioner had *refused* to join the union, the result would not, as in *Virginia Electric Power*, have been an unlawful discharge for which backpay would have been available by the express terms of § 10(c);

rather, the result would have been a loss of profits for which, as we have shown, Congress did not authorize the Board to provide a monetary compensation.[6]

Thus, petitioner's analogy to *Virginia Electric Power* is misconceived. Here, by contrast to *Virginia Electric Power*, the employer is seeking a remedy for an injury that unquestionably would *not* be compensable under § 10(c) had he opted not to join the union; that the employer chose to minimize his losses by joining does not change the nature of his damages so as to make his losses compensable through § 10(c).

The sum of the matter is that Congress has never retreated from the philosophy expressed by Senator Taft in 1947, when he proposed enactment of § 303: "if a remedy is to be provided at all, if there is to be any recourse for financial losses caused [to non-employees] by unions, it must be by direct suit" (*supra*, p. 7). Accordingly the Board is without power to award the monetary remedy sought by petitioner here.

CONCLUSION

For the above stated reasons, the decisions below should be affirmed.

Respectfully submitted,

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[6] Indeed, Congress understood that even with respect to unlawful secondary boycotts, where in "[a] typical case . . . the small businessman is practically put out of business," monetary remedies for such losses would not be available in Board proceedings. 2 Leg. Hist. (1947) at 1371 (Sen. Taft).

Docket Sheet

NO. 81-1627-CFX	TITLE Larry SHEPARD, Petitioner v. National Labor Relations Board, et al.

DOCKETED	COURT
Mar. 3, 1982	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Robert F. Gore
	Counsel for Respondents: Solicitor General, Robert W. Bell, Jr., Robert Varde Kuenzel, Richard D. Prochazka
Mar. 3, 1982	Petition for writ of certiorari filed. (Record filed).
Apr. 6, 1982	Order extending time for the Government to file a response to the petition until Apr. 19, 1982.
Apr. 7, 1982	Brief for Intervenor Respondent in opposition filed.
Apr. 5, 1982	Brief for Intervenors Association General Contractors of America, et al. in opposition filed.
Apr. 1, 1982	Brief of respondent California Dumpt Truck Owners Association in support of petition filed.
Apr. 16, 1982	Brief for respondent NLRB in opposition filed.
Apr. 21, 1982	DISTRIBUTED. 5-13.
May 17, 1982	Petition GRANTED.

June 22, 1982	Order extending time to file the petitioner's brief on the merits until July 9, 1982.
July 1, 1982	Joint appendix filed.
July 9, 1982	Order further extending time to file the petitioner's brief on the merits until July 13, 1982.
July 12, 1982	Brief for the Petitioner filed.
July 12, 1982	Brief for respondent California Dump Truck Owners Association filed.
July 28, 1982	Motion of the Solicitor General for divided argument filed.
Aug. 10, 1982	Brief for respondents Associated General Contractors of America, et al. filed.
Aug. 12, 1982	Brief of respondent Building Material and Dump Truck Drivers, Teamsters Local 36 filed.
Aug. 13, 1982	Order extending time to file NLRB's brief on the merits until Sept. 7, 1982.
Aug. 19, 1982	Motion of California Dump Truck Owners Association for divided argument and for additional time for oral argument filed.
Sept. 9, 1982	The motion of the Solicitor General for divided argument for additional time for oral argument is DENIED.
	(Over)

81-1627

Title

No.

DATE	PROCEEDINGS AND ORDERS
Sept. 8, 1982	Order extending time for respondent National Labor Relations Board to file the brief on the merits until Sept. 17, 1982.
Sept. 17, 1982	Motion of The American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as Amicus Curiae filed.
Sept. 17, 1982	Brief for respondent, National Labor Relations Board, filed.
Sept. 20, 1982	Letter from counsel withdrawing motion of California Dump Truck Owners Assn. for divided argument and for additional time for oral argument filed.
Oct. 4, 1982	The motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae is GRANTED.
Oct. 13, 1982	CIRCULATED.
Nov. 23, 1982	Reply brief of respondent California Dump Truck Owners Association filed. (D).
Dec. 6, 1982	ARGUED.